

University of Missouri School of Law Scholarship Repository

Faculty Publications

1986

Tort Claims against Churches and Ecclesiastical Officers: The First Amendment Considerations

Carl H. Esbeck

University of Missouri School of Law, esbeckc@missouri.edu

Follow this and additional works at: <http://scholarship.law.missouri.edu/facpubs>



Part of the [Religion Law Commons](#)

Recommended Citation

Carl H. Esbeck, Tort Claims Against Churches And Ecclesiastical Officers: The First Amendment Considerations, 89 W. Va. L. Rev. 1 (1986)

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

West Virginia Law Review

Volume 89

Fall 1986

Number 1

TORT CLAIMS AGAINST CHURCHES AND ECCLESIASTICAL OFFICERS: THE FIRST AMENDMENT CONSIDERATIONS

CARL H. ESBECK*†
© 1986

I. INTRODUCTION	2
II. THE INSTITUTIONAL INTEGRITY OF CHURCHES IN THE FIRST AMENDMENT	8
A. <i>The Theory</i>	8
B. <i>The Supreme Court Case Law</i>	14
1. Ecclesiastical Disputes	14
2. Establishment Clause	23
3. Free Exercise Clause	32
4. Freedom of Expression	35
III. THE CHURCHES' VIEWS	38
A. <i>The History of Church Discipline and Confession</i>	40
1. Early Centuries	40
2. Middle Ages	53
3. Reformation Era	58
B. <i>Current Practices of Representative Denominations</i>	63
1. Roman Catholic	63
2. Episcopalian	67

* Professor of Law, University of Missouri-Columbia. B.S., 1971, Iowa State University; J.D., 1974, Cornell University. The author acknowledges Mr. Jared R. Cone, J.D., 1986, University of Missouri-Columbia, for his able work on part III of this article.

† Copyright 1986 by C. H. Esbeck.

3. United Methodist	69
4. Presbyterian	72
5. Congregational/Bapist	74
IV. THE TORT CLAIMS	76
A. <i>Pastoral Counseling and Spiritual Guidance</i>	78
1. Clergy Malpractice	78
2. Breach of Confidential Communication	84
3. Seduction & Child Molestation	87
4. Alienation of Affections	88
B. <i>Church Discipline</i>	91
1. Selection, Discipline & Removal of Religious Officers	91
2. Discipline of Church Members	97
C. <i>Tort Claims Arising Outside the Course of Counseling and Discipline</i>	104
D. <i>Religious Fraud</i>	107
E. <i>Alleged "Mind Control" and New Religious Movements</i>	109
V. CONCLUSION	113

I. INTRODUCTION

Federal and state courts are increasingly confronted with the unenviable task of giving legal definition to matters affecting relations between religion and government.¹ Many of the lawsuits pitting church against state are surface manifestations of a more fundamental disintegration of an American public philosophy.²

¹ The *Religious Freedom Reporter*, a monthly publication of the Center for Law and Religious Freedom, has been digesting cases concerning religious liberty in the state and federal courts since January 1981. Approximately 1,000 known cases are currently pending at various trial and appellate levels in the United States. Roughly one-third of these cases concern the religiously motivated actions of individuals and two-thirds involve the relationship between government and organized religion.

² See generally A. REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* (1985); R. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984); M. HARRINGTON, *THE POLITICS AT GOD'S FUNERAL: THE SPIRITUAL CRISES OF WESTERN CIVILIZATION* (1983); W. SULLIVAN, *RECONSTRUCTING PUBLIC PHILOSOPHY* (1982); Reich, *Toward a New Public Philosophy*, *ATL. MONTHLY* May 1985 at 68; Krauthammer, *America's Holy War: Proposal for an Armistice*, *NEW REPUBLIC* Apr. 9, 1984 at 15; Stackhouse, *An Ecumenist's Plea for a Public Theology*, *THIS WORLD* Sp./Sum. 1984 at 47.

Simply put, the unabated expansion of our much-celebrated democratic pluralism has also considerably diminished those ultimate values on which Americans can claim a broad political-moral consensus.³ If there are rents in the social fabric, ideological border wars will surely follow. This is especially inevitable in the case of organized religion, for most world religions make theological claims beyond the personal and the private.⁴ Both Judaism and Christianity, for example, are ways of looking at the totality of reality. Thus, uncompromising claims are made by them concerning the nature and limited role of the state, and qualifications are placed on the individual believer's allegiance to the state and its civic demands for compliance with public duties.⁵ As the state also makes affirmative demands on citizens and social institutions, often imposing a uniformity insensitive to the very religious pluralism it promotes, tensions follow many of which find their way into civil court.⁶

By and large, the legislative and executive branches can maneuver around these border clashes by simply refusing to deal with them. Not so with the civil courts, for if the matter is justiciable, their duty is to hear the parties out and render a judgment. A final judgment is a very particularistic result, necessarily yielding a "winner" and a "loser." This is bound to stir emotions and generate sharp debate, for the social implications of deeply held religious views are simply not amenable to judicial resolution such as, for example, the terms of a commercial transaction gone awry.

At the level of the United States Constitution, the courts have at their disposal a regrettably tentative, tersely expressed, and by no means unambiguous set of legal categories, since those provided by the first amendment⁷ and Article VI, para. [3]⁸ supply but limited direction. Most opinions by the United States Supreme Court following the 1947 decision in *Everson v. Board of Education*⁹ have been read by some as shameful concessions to organized religion, and by others as reinforcing the secularization of public life and the concomitant privatization of religious faith.¹⁰ The result has been that all the disputants are dissatisfied at

³ Canavan, *The Pluralist Game*, 44 LAW & CONTEMP. PROBS. 23 (1981); Hitchcock, *Church, State, and Moral Values: The Limits of American Pluralism*, 44 LAW & CONTEMP. PROBS. 3 (1981); Hitchcock, *Competing Ethical Systems*, IMPRIS Apr. 1981 at 10.

⁴ See H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974) (all traditional religions in the West have a concern for social order and social justice that causes them to be concerned with government and law).

⁵ See, e.g., Noll, *Is This Land God's Land?*, 30 CHRISTIANITY TODAY July 11, 1986 at 14.

⁶ Carlson, *Regulations and Religion: Caesar's Revenge*, REGULATION May-June 1979 at 27.

⁷ U.S. CONST. amend. I. The Establishment and Free Exercise Clauses together read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." *Id.*

⁸ U.S. CONST. art. VI, provides in pertinent part: "[N]o religions Test shall ever be required as a Qualification to any Office or public Trust under the United States." .

⁹ *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

¹⁰ Compare Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463 (1981) with J. WHITEHEAD, *THE SEPARATION ILLUSION* (1977).

some time, and the "troops" are further activated for a sustained campaign in or against the halls of justice. Clarity is only momentarily achieved by each of the Court's judgments, the concurring and dissenting opinions taking their toll, and the justices seem resigned to await another opportunity to rethink their position and decide again next term.

This, of course, is how the law grows. But it is also the means by which confusion—and some mistakes—are introduced into juridical arrangements that were thought to be settled. This peculiarly American zeal for progress through judge-made law, an attitude that gives little regard for social conventions of the past, along with increased litigiousness in society, are responsible for the rash of new theories sounding in tort being filed against churches, clerics, and lay religious officers. Such tort claims are properly seen as part of an overall increase in government intervention in religious affairs.¹¹ However, unlike those church-state conflicts involving direct federal and state bureaucratic regulation of the activities of religious organizations, the only governmental involvement in private law actions in tort is through the referee-like role of the civil courts. Although this engagement between church and state was not initiated by government, nonetheless, when the civil courts hold that such tort actions state a claim upon which relief can be granted, serious issues arise concerning interference with church affairs and thus religious liberty.

The more highly publicized tortious claims of this nature have been actions by church members against their church for excommunication meted out for sexual indiscretions,¹² claims of clergy malpractice where injury is said to have resulted from inadequacies in pastoral counseling,¹³ and allegations of fraud or other overreaching brought by ex-members of new religious movements or "cults."¹⁴ There

¹¹ See generally GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS (D. Kelley, ed. 1982); GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS—SECOND (D. Kelley, ed. 1986). See also authorities cited in *supra* note 6.

¹² See, e.g., *Guinn v. Church of Christ of Collinsville, Okla.*, No. CT-81-929 (Tulsa, Okla. Dist. Ct. Jan. 7, 1983) (unpublished order) (state trial court refused to dismiss action by former church member for invasion of privacy claim arising out of church disciplinary proceeding), appeal denied, No. 59,623 (Okla. Sup. Ct. Mar. 1, 1983) (unpublished order), *cert. denied sub nom. Church of Christ of Collinsville v. Graham*, 464 U.S. 821 (1983), *on remand*, *Guinn v. Church of Christ of Collinsville, Okla.*, CT-81-929 (Tulsa, Okla. Dist. Ct. Mar. 15, 1984) (judgment for \$390,000 following jury verdict), *appeal docketed*, No. 62154 (Okla. Sup. Ct. Apr. 16, 1984). *Guinn* is discussed *infra* notes 613-18 and accompanying text.

¹³ See, e.g., *Nally v. Grace Community Church of the Valley*, No. NCC 18668 B (Cal. Super. Ct. Los Angeles Co. Oct. 2, 1981) (unpublished opinion) (dismissal of clergy malpractice suit by parents of suicide victim who had been obtaining counseling from church staff), *rev'd*, 157 Cal. App. 3d 912, 204 Cal. Rptr. 303 (1984), *on remand*, *Nally v. Grace Community Church of the Valley*, No. NCC 18668 B (Cal. Super. Ct. Los Angeles Co. May 16, 1985) (unpublished opinion) (motion for nonsuit granted for reasons of religious liberty and for insufficient evidence), *appeal docketed*, No. B015721 (Cal. App., 2d Dist. Mar. 20, 1986). *Nally* is discussed *infra* notes 482-510 and accompanying text.

¹⁴ See, e.g., *Christofferson v. Church of Scientology*, 57 Or. App. 203, 644 P.2d 577 (1982) (reversing judgment of two million dollars on fraud claim against church and remanding for new

are numerous other novel tort theories that have not caught the attention of the popular media, and they will all be surveyed in this article.¹⁵ These claims are to be distinguished from those arising out of automobile accidents by persons on church business,¹⁶ and the now commonplace "slip and fall" and other premise liability type of torts,¹⁷ actions for which churches have rightly been liable since the abandonment of the charitable immunity defense.¹⁸

The advent of these new torts has been greeted with much thoughtful concern and, in some quarters, exaggeration and alarm. A president of a local bar association in California said:

Recent malpractice litigation seeking to hold the clergy liable for the quality and content of its counseling advice and services could jeopardize the historical "wall of separation" between the church and the state by stifling the willingness of the church to continue providing its free pastoral counseling services. . . . Clergy malpractice litigation. . . has been marked by extensive queries into the religious doctrines and beliefs espoused by church leaders in not only one-on-one counseling but their pulpit sermons as well.¹⁹

Another commentator wonders at the full scope of this litigation explosion:

There has been an outpouring of claims and lawsuits against church corporations, church officials, and the clergy as a result of alleged wrongdoing. One hears the buzz words "clergy malpractice," but the malpractice allegation is but a part of the broader field which includes such items as child abuse, embezzlement, inadequate teaching, paternity, and improper counselling.²⁰

Finally, the director of a parachurch ministry views lawsuits over church discipline, as contrasted with tax regulations pertaining to churches, as a struggle over the very right of the church to exist as distinctive from the dominant culture it is called to reform:

One of the jurors in [a church discipline] case summed up its central issue when he said indignantly, "I don't see that it's the church's business to tell people how to live." In other words, can a church insist that its members live by biblical standards of righteousness?

Does the greater threat to religious freedom in this country involve how we handle mammon or how we respect biblical commandments of holiness? . . . Even if there

trial), *appeal dismissed*, 293 Or. 456, 650 P.2d 928 (1982), *cert. denied*, 459 U.S. 1227 (1983), *on remand*, No. A7704-05184 (Or. Cir. Ct., Multnomah Co. July 19, 1985) (mistrial declared after jury verdict of \$39 million; awaiting new trial). *Christofferson* is discussed *infra* note 671 and accompanying text.

¹⁵ See *infra* notes 474-675 and accompanying text.

¹⁶ See, e.g., *Malloy v. Fong*, 37 Cal.2d 356, 232 P.2d 241 (1951) (accident involving automobile driven by minister in course of his employment attributable to church).

¹⁷ See, e.g., *Stevens v. Bow Mills Methodist Church*, 111 N.H. 340, 283 A.2d 488 (1971) (church liable for trip and fall by invitee on church premises).

¹⁸ See, e.g., *Gable v. Salvation Army*, 186 Okla. 687, 100 P.2d 244 (1940).

¹⁹ Wise, *Clergy Malpractice Suits: First Amendment Under Siege*, 8 L.A. LAW. 20 (1985).

²⁰ *McMenamin, Clergy Malpractice*, 90 CASE & COM. 3 (1985).

is an issue of religious liberty in the [tax evasion] case, the threat in the [church discipline] case is demonstrably greater. If the U.S. government seized all of our bank accounts, it could not destroy the church; but if it successfully prevented the church from requiring that its members obey biblical standards, we might as well close our doors.²¹

This article will develop the argument that the first amendment, insofar as it addresses the matter of organized religious societies, regulates the nature and degree of involvement between the institution of the state and the institution of the church.²² The degree of involvement should be a limited one, but it is also clear that the interrelationship need not and cannot be eliminated altogether.²³ Although the exact calculus of the desired separation has proven to be a continuing controversy, the goal of institutional separation is not so divisive. The aim is for each to give the other sufficient breathing space.²⁴ The ordering principle at work is one of mutual forbearance whereby "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."²⁵ Those who were influential in our nation's history envisioned the churches and the state in a kind of parallelism, with neither subordinate to the other.²⁶ Each should be guarded from being co-opted by the other, and each required to refrain from dependence upon and undue entanglement with the instrumentalities of the other. Importantly, if the first amendment's structural ordering of these two circles of influence in society is reciprocal, then religious organizations are afforded a high level of immunity from governmental interference with their internal affairs. This means that many of these new tort claims, certainly those of clergy malpractice and the injury-to-reputation type of claim flowing from ecclesiastical discipline of church members,²⁷ are incompatible with the separation of church and state.

To be sure, the desire to safeguard the institutional liberty of the churches and the desire to interpose the state on the side of persons who are said to have

²¹ Colson, *Friends of Religious Liberty: Why the Embarrassing Silence?* 30 CHRISTIANITY TODAY 56 (1986).

²² R. LEE, A LAWYER LOOKS AT THE CONSTITUTION 129, 135 (1981); see J. ELY, DEMOCRACY AND DISTRUST 94 (1980).

²³ *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 213, 225 (1963); *Id.* at 305 (Goldberg, J., concurring); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

²⁴ J. ELY, *supra* note 22 at 97.

²⁵ *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (disallowing religious instruction on public school campus).

²⁶ Derr, *The First Amendment as a Guide to Church-State Relations: Theological Illusions, Cultural Fantasies, and Legal Practicalities*, CHURCH, STATE AND POLITICS 75, 82 (J. Hensel ed. 1981).

²⁷ The type of church discipline discussed throughout this article is solely ecclesiastical. Neither corporal punishment nor a civil penalty enforced by the state courts could ever be permissible church discipline consistent with the First Amendment. Cf. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) (zoning ordinance that gave civil "veto power" to churches to prevent issuance of liquor licenses in vicinity of church was inconsistent with establishment clause because it placed civil power in hands of church).

received tortious injury at the hands of a religious society are in tension. Because of their very temporality, churches and other religious organizations are not without wrongdoing. Their activities, as opposed to beliefs, therefore, cannot be totally autonomous from the state when it comes to matters of high order, such as health, safety, and public peace. The state must have the power to intervene in truly exigent matters, even when it means overriding religious authorities acting upon sincerely held beliefs.²⁸ Thus, a balance must be struck between the needs of the religious community and the protection of citizens from tortious injury, even when these individuals voluntarily connected themselves with the church they now wish to sue. But the first amendment weights the scale on the side of liberty. That is one of the choices—call it a price, if one prefers—of living in a free and plural society.

Whenever the relationship between church and government is examined, fundamentally there are three possible approaches to the study. First, the religious organization is evaluated by the political authority in terms of the state's own understanding concerning governmental responsibility for order and justice. This is the method of the political philosopher. Second, one can draw out the church's own conception of the state and society, matters significantly shaped by the church's consciousness of a believed divine mission within history. This is a study of the work of the theologian. Finally, third, the courts and their work product, the case law bearing on religious freedom, are seen as instruments meting out constitutional theory, typically reflecting a juridical view of religion's historical role and social utility.²⁹ As to this third approach, it must be said that an exclusive focus on the case law in the courts necessarily yields some bias favoring the underlying political view of religion held by the state—that is, the third methodology is a particularization of the first approach.

Part II of this article will begin with this third methodology. United States Supreme Court cases which bear upon the question of noninvolvement with religious organizations so as to preserve their institutional integrity and freedom to

²⁸ See M. BATES, *RELIGIOUS LIBERTY: AN INQUIRY* 301 (1945):

[U]pon occasion individuals and religious bodies alike have erred grievously against the moral sense or the felt need of solidarity in the community....The State as the authority of the organized community has continually abused the argument of solidarity and even that of moral standards....But it is difficult to see how any other authority than the State, inspired and checked by the convictions and sentiment of the whole community, can carry this necessary responsibility of guarding society and its other members against the eccentricities—if they are seriously harmful—of one or a body.

Hence, the right of religious liberty is not absolute in extent but is subject to definition and interpretation by the community, at costly risk, in the State and its laws. *Id.* Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (racial discrimination in education); *Jehovah's Witnesses v. King County Hosp.*, 390 U.S. 598 (1968) (*per curiam*) (no parental right to withhold necessary blood transfusion from child); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child-labor laws); *Davis v. Beason*, 133 U.S. 333 (1890) (Mormon polygamy).

²⁹ T. SANDERS, *PROTESTANT CONCEPTS OF CHURCH AND STATE: HISTORICAL BACKGROUNDS AND APPROACHES FOR THE FUTURE* 1-3 (1964).

act in society will be analyzed. Attention will be given to the development of the concepts of nonentanglement and the avoidance of civil resolution of intrafaith disputes. Parallels will be drawn between these concepts and the Court's reluctance to probe the sincerity of an individual's religious belief or to measure its centrality (i.e., the importance of a given religious duty to the religion) for first amendment purposes. It will be proposed that these somewhat scattered doctrines be marshalled into a general theory under the first amendment barring claims in tort that compromise churches in organizing and controlling their staff and lay officers, defining the nature and distinctive character of their membership, and in carrying out their ministerial calling as they understand it. Part III of this article will take the second approach, that of examining how various religious traditions understand themselves and their functions of self-government, teaching, counseling, and discipline. Finally, Part IV will survey the new tort claims that are now being brought in the state and federal courts. Those claims which implicate religious liberty will be identified and distinguished from those that do not, followed by application and eventual defense of the stated thesis. Since church autonomy cannot be without limit, it will be suggested that tortious claims be permitted, even where it hinders religious liberty, if compelling societal reasons of health, safety, or public peace are demonstrably present.

II. THE INSTITUTIONAL INTEGRITY OF CHURCHES IN THE FIRST AMENDMENT

A. *The Theory*

Both the text of the first amendment and the very nature of democratic pluralism in Western political theory provide strong arguments for the juridical recognition of a sphere of autonomy for religious organizations. Now that the Free Exercise and Establishment Clauses have been incorporated through the fourteenth amendment and made applicable to the states,³⁰ both doctrinally and in sociopolitical theory, the first amendment provides a defense immunizing churches from the recent tort actions being filed against them that touch on matters of creed, teaching, and ecclesiastical discipline.

Although the text of the first amendment has been construed to afford a limited freedom of association by implication only, the establishment clause necessarily acknowledges the ontological existence and limited autonomy of religious organizations through the requirement of church-state separation. The mandate of institutional separation is addressed to government and any involvement it contemplates with identifiable sectarian societies and their particular modes of religious practices. The command is *not*, of course, to separate government from individuals who choose to hold religious beliefs. The latter would be virtually

³⁰ The Free Exercise Clause was incorporated into the due process clause of the fourteenth amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and the Establishment Clause was first incorporated in *Everson*, 330 U.S. 1.

impossible, for when a citizen of the state is also religious, separation can be achieved only by exile, death, or cleaving the human heart in two.³¹ Unlike all other voluntary associations, the separation mandate demonstrates that the place of religious associations has been recognized as a special problem for which the very text of the establishment clause makes special provision.³² Through often painful experience, the American arrangement is to now distance, within the larger free society, the state from the organized church.³³ To achieve this desired separation, the distinct existence or ontology of the church is inescapably acknowledged by the civil judicial system. Moreover, the institutional separation implemented by the establishment clause is for the mutual benefit of both church and state. Accordingly, the church refrains from using the state and the civil law's coercive power to achieve its sectarian purposes, and reciprocally the church *qua* church is immune from undue governmental interference within its sphere of competence.

Theoretically, the same result can be achieved even without the institutional separation requirement of the Establishment Clause. Democratic pluralism in political theory reasons that the ongoing development of a liberal society can thrive

³¹ W. MARNELL, *THE FIRST AMENDMENT: THE HISTORY OF RELIGIOUS FREEDOM IN AMERICA* xiii-xiv (1964).

The 'wall of separation between Church and State' was not and could not be a Chinese Wall to separate the eternal and the temporal. The real relationship between Church and State, in America and in every country where religion is strong, is a thing of the spirit, the infusion of the spirit of religion into the ordering of the affairs of society. A wall of separation which would bar that spirit from making itself felt in secular concerns can never be built, because it would have to bisect the human heart.

Id.

[A]s sharply distinct as they may be, the Church and the body politic cannot live and develop in sheer isolation from and ignorance of one another. This would be simply anti-natural. From the very fact that the same human person is simultaneously a member of that society which is the Church and a member of that society which is the body politic, an absolute division between those two societies would mean that the human person must be cut in two.

J. Maritain, *Man and The State* 153-54 (1951). See G. Ruggiero, *The History of European Liberalism* 404 (1927).

³² *The Juridical Status of Churches*, INSTITUTE OF CHURCH AND STATE: PROCEEDINGS 1, 29, 36, 47-49 (O'Toole ed. 1958) (comments by Brady and Pfeffer); cf. Richardson, *Civil Religion in Theological Perspective*, AMERICAN CIV. RELIGION 161, 178-80 (Richey & Jones eds. 1974).

³³ Care must always be taken to resist attempts to subsume all of society under the institution of the state. See Hehir, *Religious Transnationalism: Personal Conscience, Civic Loyalty, and Political Legitimation*, CHURCH & STATE ABROAD 2, 3 June 1986:

No idea is more centrally located in the American political tradition than the distinction between society and state. The state is only part of the society; it is constitutionally limited to fulfill specific functions, but is never to be identified with the society as such. Such an identification is the essence of a totalitarian state. To accept the separation of church and state does not mean to accept any notion that the church should be separate from the wider civil society. It is precisely here, in this wider area of freedom, that the religious communities exercise a public role through preaching, teaching, establishing educational and social institutions, and bringing their specific voices to the wider public policy debate.

only in responsible freedom. Unless citizens exercise their freedom responsibly out of self-restraint, the coercive power of the state cannot recede into the background. Moreover, people are by nature social creatures, naturally forming small, like-minded communities. Since much of the life of a culture is shaped by these nongovernmental communities and organizations, many of which are rich sources of duty, authority, and discipline, the state would stifle society if it overly controlled the lives of these voluntary associations.³⁴ Affording jurisprudential recognition to these intermediate social arrangements has two consequences that are politically desirable: it checks the centralization of power in big government by diffusing leadership throughout society, and it retards the march of rampant individualism by channeling personal freedom in meaningful ways. The theory of democratic pluralism, therefore, posits more than the protection of individual rights.³⁵ It also recognizes the contribution to freedom of socializing institutions, such as voluntary organizations and cultural or ethnic subgroups, and thus holds in high regard associational rights.³⁶ The aim is to sustain society's intermediate institutions and thereby maximize an ordered liberty, that is, the freedom for moral and rational development within a variety of differentiated communities.

A jurisprudence which affords limited spheres of autonomy for voluntary associations (as against individuals who wish to be totally free of the association's authority) must meet the argument that law is taking away individual freedom in order to save it. The charge is false and those who make it fail to understand that individual freedom is only the means of democratic pluralism, not its ultimate goal.³⁷ A democratic society is first of all a society. Society is not solely composed of wholly autonomous individuals; it is composed of individuals and institutions

³⁴ M. ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* 240, 241 (2d ed. 1981); D. FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* 37, 104 (1963); R. HORN, *GROUPS AND THE CONSTITUTION* 18, 155-60 (1968); R. NISBET, *COMMUNITY AND POWER* 70 (1962); C. RICE, *FREEDOM OF ASSOCIATION* 54 (1962); Howe, *Forward: Political Theory and The Nature of Liberty*, 67 HARV. L. REV. 91 (1953); Chafee, *The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 993, 1021-29 (1930); Note, *Developments in The Law: Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 986-88, 991, 995, 1055 (1963); see *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984) ("[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.").

³⁵ M. BATES, *supra* note 28, at 398-99.

³⁶ See *Healy v. James*, 408 U.S. 169 (1972) (college's denial of recognition to student political group violated first amendment guarantees of expression and association); *Brotherhood of Ry. Trainmen v. Virginia St. Bar*, 377 U.S. 1 (1964) (injunction prohibiting union from advising members and recommending legal counsel held contrary to first amendment guarantee of freedom of association); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (compelled disclosure of membership list constitutes unlawful restraint on freedom of association); cf. *Roberts*, 468 U.S. 609 (1984) (acknowledging that some associations are sufficiently private—but not the Jaycees—so that they are immune from civil rights legislation). See also M. Abernathy, *supra* note 34, at 239-44; D. FELLMAN, *supra* note 34, at 2, 34, 104; R. HORN, *supra* note 34, at 14-16, 152; H. LASKI, *FOUNDATIONS OF SOVEREIGNTY* 245-46 (1921).

³⁷ Cohen, *The Problem of Pluralism, Religion and The Free Society* 35, 45-47 (1958).

that may choose to submit to all sorts of authoritarian groups (whether they purvey the absolutisms of ideology, passion, or religious belief) and yet be politically free. What makes a society politically free is the arrangement whereby individuals may consent to be bound by the values and rules of their chosen group. So long as the individual acquiesced in being bound to the discipline and order imposed by the association, the individual is still politically free.

Those who would deny legal protection to the association as against its dissident members would impose by force of law a libertarian-type individualism upon all society, against the will of those who seek communal benefits and authority. The proponents of individualism are in error because, in their opposition to a limited autonomy for associations, they convert individual liberty into the only absolute. A purely individualistic conception of liberty denies associations the very characteristics that enable them to offset government power, thus making all authority which does not reside either in the individual or the state the opponent of the well-being of the body politic.³⁸ And inevitably, the wholly autonomous individual offers inadequate resistance to the state's tendency to arrogate increasing power to itself so as to bridle runaway individualism and maintain order. Rather than a dispersion of power along a differentiated, if uneven, social landscape, the consequence is the nonpluralistic, leveling tendency of a state conforming all private associations to public standards.³⁹

Churches and other religious organizations are among the mediating structures in a culture, occupying the space between the individual and government, and serving as loci of responsibility, commitment, and identity for many people.⁴⁰

³⁸ *Id.*

³⁹ See, e.g., Calhoun, *Democracy and Natural Law*, 5 NAT. L. FORUM 31, 36 (1960): One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommunities—family, school, business, press, church—completely subject to control by the State. The State then is not one vital institution among others: a policeman, a referee, and a source of initiative for the common good. Instead, it seeks to be coextensive with family and school, press, business community, and Church, so that all of these component interest groups are, in principle, reduced to organs and agencies of the State. In a democratic political order, this megatherian concept is expressly rejected as out of accord with the democratic understanding of social good, and with the actual make-up of the human community.

⁴⁰ P. BERGER & R. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 1-8 (1977). Sociologist Peter Berger has identified such institutions as family, neighborhood, and church as the value-generating and value-maintaining agencies of a society. These structures are poised between the public institutions of the modern nation-state and the solitary individual. Intermediate structures, therefore, are situated to be useful to both the political order and the individual.

It is a crisis for the individual who must carry on a balancing act between the demand of the two spheres. It is a political crisis because the megastructures (notably the state) come to be devoid of personal meaning and are therefore viewed as unreal or even malignant. Not everyone experiences this crisis in the same way. Many who handle it more successfully than most have access to institutions that mediate between the two spheres. Such institutions have a private face, giving private life a measure of stability, and they have a public face,

Next to the family, religious organizations comprise the largest single group of societal institutions which generate, mold, and propagate those shared norms essential to a reasonably cohesive society capable of self-government.⁴¹ And it is recognized that important aspects of religion find meaning and expression only in the social form we call the church.⁴² Worship, for example, is not commonly a solitary experience in either Christianity or Judaism. Thus, Western democratic theory argues for the institutional integrity of churches because of their socio-political utility. As for themselves, churches have a very different perspective as to the reason for their existence⁴³ and the rationale for immunizing them from tortious claims which intermeddle in their sphere of competence.

Some have argued that freedom of association is simply derivative of individual rights, a necessary implication, it is said, of the obvious fact that persons can more effectively exercise their civic rights when they band together with like minded people and pool resources.⁴⁴ However, democratic pluralism recognizes an associational freedom for churches and other pervasively sectarian organizations that goes beyond the mere enhancement of individual liberty. That is, acknowledging a limited autonomy for churches is not simply an indirect way to corporately protect the free exercise of religion for each of a church's members. If that were all the courts intended by the institutional rights of churches, then those rights would be entirely derivative of the individual liberties of those who make up a church's membership. Church autonomy, were it rooted in a purely individualistic conception, would dissolve in the face of, and to the extent required by, an individual's claim to deprivation of religious liberty. This is merely tautological, for if the rights of churches are constructed for the sole purpose of advancing individual liberties, it cannot simultaneously be made to defeat them. The Supreme Court, however, has recognized in the first amendment a nonderivative conception of liberty held by religious organizations.⁴⁵ Were that not so,

transferring meaning and value to the megastructures. Thus, mediating structures alleviate each facet of the double crisis of modern society. Their strategic position derives from their reducing both anomic precariousness of individual existence in isolation from society and the threat of alienation to the public order....

Without institutionally reliable processes of mediation, the political order becomes detached from the values and realities of individual life. Deprived of its moral foundation, the political order is 'delegitimated.' When that happens, the political order must be secured by coercion rather than by consent. And when that happens, democracy disappears.

Id. at 3.

⁴¹ *Id.* at 26-30; R. NEUHAUS, *CHRISTIAN FAITH & PUBLIC POLICY* 178 (1977). Recent figures from 224 religious denominations in the U.S. show a combined membership of 142,172,138, an increase of 0.9 percent over the prior year. *THE YEARBOOK OF AMERICAN AND CANADIAN CHURCHES* (Jacquet ed. 1984).

⁴² D. Kelley, *WHY CHURCHES SHOULD NOT PAY TAXES* 49 (1977).

⁴³ See Richardson, *supra* note 32 at 161, 178-80; see also *infra* notes 201-473 and accompanying text.

⁴⁴ See R. HORN, *supra* note 34 at 5-7 (Hobbes and Rousseau argued against locating any autonomy from the state in voluntary associations).

⁴⁵ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 876 (1978). See also *infra* notes 48-107 and accompanying text.

churches would not be seen as having countervailing legal rights against a dissident member who has sued his or her own church.

As an illustration, assume an energy crisis causes a state to enact legislation banning all automobile driving on Sunday. The idea is facially neutral, namely to conserve gasoline while causing minimal disruption to the economy. The rights of First Church and its 100 members who feel constrained to worship on Sunday are unquestionably impinged. First Church could bring an action against the government in its own name, or some of the 100 members could join in an action that names each individually. The choice of party-plaintiff makes little difference because the liberty of First Church *qua* church and the sum of the collective liberties of the individual members coincide. That is, the result is the same whether the religious liberty of First Church is either conceptualized as nonderivative of or merely instrumental to the free exercise rights of the individual members. So long as the members are not internally divided in their claim for protection against the state, the nonderivative and instrumental theories of associational rights converge.⁴⁶

When the members are divided, however, and the individual rights of one or more members are pitted against the group, the choice of underlying theory is critical. Assume that First Church calls a meeting at which the church board announces that it has employed a woman to fill the current vacancy in the pastorate. Seventy-five of the 100 members strongly object to the selection of a female pastor on the basis that such a move is contrary to a proper interpretation of doctrine. The church board, nonetheless, refuses to reconsider the employment, for the polity of First Church, as evidenced in the Church's constitution and by-laws, places the board in control of such decisions. If the seventy-five members complain that their liberty to freely exercise their religion is denied, and they institute a civil suit to have the employment contract rescinded, the courts will reply that their liberty as the law recognizes it is not denied.⁴⁷ The seventy-five consented to the leadership arrangement of First Church when they became members. Having acquiesced in the authority of the Church as constituted, the dissidents (for that is how the law views them, even if they number in the majority) have no legally cognizable claim. If others, either outside or inside First Church, believe a nondemocratic and thus unjust result has been reached, that is no concern of the first amendment. Were a church simply instrumental of individual religious exercise, it would be treated like a commercial partnership, the enterprise would be dissolved and the assets divided by the court. The religious autonomy of First Church is not, however, derivative of the members' individual liberties regardless of how sincerely they hold their doctrinal opposition to a female min-

⁴⁶ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (rights of Old Order Amish and that of Amish parents coincide); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (rights of church school and parents of school-age children coincide); cf. *Roberts*, 468 U.S. at 618 ("The intrinsic and instrumental features of constitutionally protected association may, of course, coincide.").

⁴⁷ See *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). These cases are discussed *infra*, at notes 71-96 and accompanying text.

ister. The recourse is for the seventy-five either to reconcile themselves to a female pastorate or to break off and form a new church more to their liking, a matter which, of course, the courts will vouchsafe.

The operative legal principles at work here are the consent of individuals to be governed by the authoritative arrangement of the church they voluntarily joined, the concomitant sphere of autonomy for the church within the ambit of its competence, and the reciprocal noninterference inherent in church-state separation. The same complementary principles are at work when members or ecclesiastical officers sue their own church alleging various torts which implicate the religious liberty of the church.

B. *The Supreme Court Case Law*

1. Ecclesiastical Disputes

As with other voluntary associations, occasionally divisions arise within the membership or among the officers of churches and other pervasively sectarian associations. Considering their professed purpose, churches are seldom placed in a more unfavorable light than when one of the factions files suit in civil court to resolve a schism. Although the civil courts have little choice but to accept jurisdiction, their role is constrained by the first amendment's "promise of nonentanglement and neutrality"⁴⁸ which compels the avoidance of questions "made to turn on the resolution. . . of controversies over religious doctrine and practice."⁴⁹ Thus, the Supreme Court's cases dealing with intrafaith disputes are co-generic with nonentanglement concerns:⁵⁰ the avoidance of involvement in doctrinal and other religious questions, the prevention of civil authorities shaping the purpose and scope of religious programs and the duties of church personnel, and a reluctance to delve into financial matters of religious organizations.⁵¹

A useful division of the Court's pronouncements is to separate those religious disputes that concern primarily ecclesiastical matters, such as appointment of clergy or the discipline of a member for misconduct, from those disputes that are before the civil courts principally to declare the present ownership of property between two rival factions. Clearly, there is a greater governmental interest in the orderly

⁴⁸ *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

⁴⁹ *Presbyterian Church v. Mary Elizabeth Blue Hull Church*, 393 U.S. 440, 449 (1969).

⁵⁰ See *infra* notes 108-168 and accompanying text. *Accord*, *Little v. First Baptist Church, Crestwood*, 106 S. Ct. 1802 (1986) (*cert. denied*) (Marshall and Brennan, JJ., dissenting).

⁵¹ Government involvement in what are essentially religious decisions or acts of religious discipline may arise in several ways. For example, governmental involvement may arise in (1) disputes concerning the terms and conditions of employment, including discrimination; (2) the discipline or discharge of an employee; (3) the discipline of an individual served by a ministry, including suspension or withholding of services to the individual; (4) complaints from members of the public to government officials concerning a ministry's refusal to admit them or otherwise offer services on a nondiscriminatory basis; and (5) disputes within the governing board over a ministry's policies and direction.

resolution of matters concerning title to property. Questions concerning who may hold a church office, the discipline of a recalcitrant member, or an alleged departure from doctrine, however, are wholly outside of civil competence. The contrariety of views within the Supreme Court exists only concerning the limited role of civil courts in intrafaith disputes over title to real estate. In disputes which do not concern the control of property, the Court consistently has held that civil authorities have no jurisdiction.

In *Watson v. Jones*,⁵² the Supreme Court established the first broad principles of judicial deference to the internal dispute resolution processes of religious bodies. The federal court had diversity jurisdiction in the case, and the rule of decision was based on federal common law.⁵³ *Watson* involved a struggle between two factions of a local Presbyterian Church for control of the church building. Title to the property was in the name of the trustees of the local church. The deed and charter of the local church, however, "subjected both property and trustees alike to the operation of [the general church's] fundamental laws."⁵⁴ The general church was the Presbyterian Church of the United States. Its governing body was called the General Assembly. The ecclesiastical rules of the General Assembly stated that the assembly possessed "the power of deciding in all controversies respecting doctrine and discipline."⁵⁵

Following the Civil War, the General Assembly ordered the members of all local congregations who believed in the divine character of slavery to "repent and forsake these sins."⁵⁶ A majority of the local church was willing to comply with the directive. A minority faction, however, deemed the resolution of the Assembly a departure from the doctrine held at the time the local church first joined with the general church. The minority's theory was that the general church held an interest in the property of the local church, subject to an implied trust in favor of the doctrine to which the original church was devoted. Any departure from doctrine by the general church meant a breach of trust and thus forfeiture of its interest in the property occupied by the local church. Accordingly, the minority faction claimed that the majority relinquished any right to control the property when it repudiated the original, pro-slavery doctrine. The minority alleged that they were the true church, and should control the church grounds.⁵⁷

The implied trust theory, with its origin in English law,⁵⁸ was rejected by the

⁵² *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

⁵³ Since *Watson* was decided prior to *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938), in following *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), federal courts did not hesitate to deviate from state substantive law. Further, the first amendment religion clauses had not yet been applied to the states. See *supra* note 30.

⁵⁴ *Watson*, 80 U.S. (13 Wall.) at 683.

⁵⁵ *Id.* at 682.

⁵⁶ *Id.* at 691.

⁵⁷ *Id.* at 691-94.

⁵⁸ *Id.* at 727-28. Apparently the English cases have their genesis in the acceptance of a church established by the state.

Supreme Court because its departure-from-doctrine feature required the civil resolution of a religious question. The *Watson* Court gave three reasons: (1) civil judges are incompetent to resolve questions concerning religious doctrine;⁵⁹ (2) members of a hierarchical church have voluntarily joined the general church body, thus giving implied consent to its internal governance;⁶⁰ and (3) the structure of our political system requires a severe limit on involvement by the civil courts in the affairs of religious bodies so as to secure religious liberty.⁶¹

A rule of judicial deference to church authority as enunciated in *Watson*, if strictly applied in conjunction with the principle of implied consent by church members, would mean that a hierarchical church judicatory has almost unlimited power over its local churches. Reflecting this concern, subsequent decisions of the Court have wrestled with how best to balance the religious liberty value of governmental noninterference with concern for individuals arbitrarily or even oppressively treated by a religious hierarchy.⁶² Most important to the inquiry, however, is that the Court's qualifications of the judicial deference rule have all related to the civil disposition of property.⁶³ The *Watson* rule remains uncompromised

⁵⁹ *Id.* at 729, 730 and 732. For example, the *Watson* Court said:

It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

Id. at 729.

⁶⁰ *Id.*

⁶¹ *Id.* at 728-29, 730. Quoting with approval from *Harmon v. Dreher*, 29 S.C.L. (2 Speers) 87 (1844), the Court said: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority." *Watson*, 80 U.S. (13 Wall.) at 730. The Supreme Court used words which were later to be read into the first amendment. *Milivojevic*, 426 U.S. at 713-14; *Kedroff*, 344 U.S. at 113; cf. *Presbyterian Church*, 393 U.S. at 446. The *Watson* Court delineated those matters which were not to be penetrated by secular authority:

[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them....

[I]t is a very different thing where a subject matter of dispute, strictly and purely ecclesiastical in its character...—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them—becomes the subject of its action.... But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court.

Watson, 80 U.S. (13 Wall.) at 727, 733 (emphasis in original). Cf. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) (holding that religious societies have complete discretion in picking their own minister, including choice of an alien residing outside United States).

⁶² See L. TRIBE, *supra* note 45 at 882-83.

⁶³ Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347, 353.

on matters of doctrine, church discipline, religious office, and religious practice.⁶⁴

The Supreme Court wasted little time putting into practice this rule where the dispute involved a congregational church and intertwined acts of member discipline with ownership of the church building. In *Bouldin v. Alexander*,⁶⁵ inquiry was permitted by the Court into whether an expulsion from church membership was truly an act of the church or of persons not so empowered and who, consequently, had no authority to excommunicate others. Following a dispute, a small minority of members in the church had issued a resolution of excommunication designed to remove the trustees and a large number of church members, thus leaving in themselves possession of the church real estate.⁶⁶ Since the polity of the church was congregational (meaning majority rule), and this was clear from the church manuals on governance, the Court held the action of the small minority "was not the action of the church, and that it was wholly inoperative."⁶⁷ But in doing so the Court acknowledged it had "no power to revise or question ordinary acts of church discipline, or of excision from membership,"⁶⁸ nor to "decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off."⁶⁹ So in applying the rule of deference to the highest church judicatory in matters concerning property, the Court may still assure itself that the ecclesiastical body claiming final authority is not making a false claim concerning its power.⁷⁰

⁶⁴ The *Watson* rule of judicial deference was expressly reaffirmed in *Shepard v. Barkley*, 247 U.S. 1 (1918), a case involving property litigation that followed the merger of two Presbyterian bodies. Eleven years later, in dictum written by Justice Brandeis, the Supreme Court in *Gonzales v. Archbishop*, 280 U.S. 1 (1929), said that the judicial deference rule would not be binding in instances of "fraud, collusion, or arbitrariness" by a church tribunal. *Id.* at 16. *Gonzales* involved an appeal from the Supreme Court of the Philippine Islands. The United States Supreme Court affirmed the lower court which had declined to overturn a decision by a Roman Catholic Archbishop that the petitioner was not qualified for appointment to an ecclesiastical office. As Justice Brandeis noted, the petitioner's main interest appeared to be the substantial money from a trust which accompanied the desired appointment. *Id.* at 18.

⁶⁵ *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131 (1872). The church property was in the District of Columbia, hence the federal courts had subject matter jurisdiction.

⁶⁶ *Id.* at 133-34.

⁶⁷ *Id.* at 140.

⁶⁸ *Id.* at 139.

⁶⁹ *Id.* at 139-40.

⁷⁰ In the decades before and after its *Watson* decision, the Supreme Court passed on a variety of intrafaith disputes involving property. Some involved bequests, as in *Stanley v. Colt*, 72 U.S. (5 Wall.) 119 (1866); *Christian Union v. Yount*, 101 U.S. 352 (1879); and *Gilmer v. Stone*, 120 U.S. 586 (1887). None of these cases, however, sought to invoke the civil courts in the resolution of questions touching religious doctrine or practice. Others involved disputes concerning property held communally and where one member had left the society and now sought restitution for his labor, such as the German Separatist colony at Zoor, Ohio, in *Goesele v. Bimeler*, 55 U.S. (14 How.) 589 (1852), and the Harmony Society of Beaver County, Pennsylvania, in *Baker v. Nachtrieb*, 60 U.S. (19 How.) 126 (1856); and *Speidel v. Henrici*, 120 U.S. 377 (1887). In *Baker*, the Court refused to get involved in the religious dispute because the plaintiff had accepted money and a contract in release of his claim, and in *Speidel*, the claim was over fifty years old and barred by laches. Finally, in

Watson v. Jones was elevated to a rule of first amendment stature in *Kedroff v. St. Nicholas Cathedral*.⁷¹ The *Kedroff* Court perceived in *Watson* a rule which "radiates...a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."⁷² In *Kedroff*, the Supreme Court struck down a New York statute that displaced control of the Russian Orthodox Churches from the central governing hierarchy located in the Soviet Union with a church organization limited to the diocese of North America. The perceived need to transfer the control of ecclesiastical polity was linked to the Revolution of 1917 and doubt concerning whether Moscow had "a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body."⁷³ Because the statute did more than just "permit the trustees of the Cathedral [in New York City] to use it for services consistent with the desires of the members," and transferred by legislative fiat the entire control over domestic churches,⁷⁴ the Court held that the statute violated the "rule of separation between church and state."⁷⁵

The *Watson* Court repudiated the implied trust rule used to sanction the departure-from-doctrine standard, but only as a matter of federal common law. A number of states continued to follow the departure-from-doctrine standard or English rule as a matter of state common law.⁷⁶ *Kedroff*, however, clearly foreshadowed the sweeping aside of the local law in all states that followed the English rule.

In *Presbyterian Church v. Mary Elizabeth Blue Hull Church*,⁷⁷ the rule in *Watson* was firmly established as a matter of church autonomy required by the first amendment. *Presbyterian Church* presented a hierarchical church dispute between a general church and two of its local member churches over the right to control the local churches' property. The controversy began when the local churches claimed that the general church had violated the organization's consti-

Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853), the Court was asked to assist in the division of common property when the Methodist Episcopal Church split over the abolition question. *Smith* might well have been decided differently had it been taken up following the Court's new direction in *Watson*.

⁷¹ *Kedroff*, 344 U.S. 94.

⁷² *Id.* at 116.

⁷³ *Id.* at 106. The specific dispute in *Kedroff* concerned which religious body had the authority to make a clerical appointment to St. Nicholas Cathedral in New York City. The Court's review, however, necessarily drew into the dispute the entire statutory scheme.

⁷⁴ *Id.* at 119.

⁷⁵ *Id.* at 110. In *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960) (per curiam), the decision in *Kedroff*, invalidating legislative action, was extended to a later state court judgment which sought to accomplish the same transfer of ecclesiastical control.

⁷⁶ Kauper, *supra* note 63 at 350-51.

⁷⁷ *Presbyterian Church*, 393 U.S. 440.

tution and had departed from accepted doctrine and practice.⁷⁸ Georgia followed the implied trust rule with its requisite fact-finding into alleged departures-from-doctrine. On the basis of a jury finding that the general church had abandoned its original doctrines, the Georgia courts entered judgment for the local congregations.

On appeal, the Supreme Court recognized that states have a legitimate interest in church property disputes, and thus courts properly may take subject matter jurisdiction.⁷⁹ The first amendment, however, does not permit a departure-from-doctrine standard as a substantive rule of decision. The "American concept of the relationship between church and state"⁸⁰ "leaves the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes."⁸¹ Notably, without spelling out in detail a legal standard which would withstand first amendment scrutiny, the Court advised that "there are neutral principles of law, developed for use in all property disputes, which can be applied"⁸² without determining underlying questions of religious doctrine and practice.⁸³ With these instructions, the Court reversed and remanded for further proceedings.

⁷⁸ *Id.* at 442 n. 1. The *Presbyterian Church* Court quoted from the opinion of the Supreme Court of Georgia, summarizing the alleged departures from doctrine by the general church:

'ordaining of women as ministers and ruling elders, making pronouncements and recommendations concerning civil, economic, social and political matters, giving support to the removal of Bible reading and prayers by children in the public schools, adopting certain Sunday School literature and teaching neo-orthodoxy alien to the Confession of Faith and Catechisms, as originally adopted by the general church, and causing all members to remain in the National Council of Churches of Christ and willingly accepting its leadership which advocated named practices, such as the subverting of parental authority, civil disobedience and intermeddling in civil affairs'; also 'that the general church has...made pronouncements in matters involving international issues such as the Vietnam conflict and has disseminated publications denying the Holy Trinity and violating the moral and ethical standards of the faith.'

Id. at 442.

⁷⁹ *Id.* at 445.

⁸⁰ *Id.* at 445-46.

⁸¹ *Id.* at 447 (emphasis in original).

⁸² *Id.* at 449. The *Presbyterian Church* Court recalled the narrower procedural review suggested by the dictum in *Gonzalez*, 280 U.S. at 16 (*see supra* note 64; *infra* note 89), that a decision by church authorities could not stand if found to be the result of "fraud, collusion, or arbitrariness," as possibly meeting the neutral principles requirement. *Presbyterian Church*, 393 U.S. at 451.

⁸³ In the term following *Presbyterian Church*, the Court dismissed for lack of a substantial federal question an appeal in a similar case from a decision of the Maryland Court of Appeals. *Maryland & Virginia Churches v. Sharpsburg Church*, 396 U.S. 367 (1970) (*per curiam*). In the Court's view, the property dispute was resolved by the Maryland courts without inquiry into religious doctrine. In a concurring opinion, Justice Brennan stated that the Court's decision in *Presbyterian Church* permitted a state to "adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Id.* at 368 (emphasis in original). Brennan then went on to broadly outline three such approaches. First, there is the *Watson* approach of judicial deference to the decision of the highest governing church authority. Where the identification of this governing authority "is a matter of substantial controversy," the civil courts cannot, consistent with the first amendment,

In a dispute similar to the ecclesiastical differences presented in *Kedroff*, the Supreme Court in *Serbian E. Orthodox Diocese v. Milivojevich*⁸⁴ rejected a bishop's resistance to the reorganization of the American-Canadian diocese of the Serbian Orthodox Church and his removal from office. Unlike *Presbyterian Church*, which was essentially a suit over the control of church real estate, *Milivojevich* involved primarily the religious concerns of church administration and clerical appointments, matters more insulated from civil review under the first amendment.⁸⁵

In *Milivojevich*, there was no dispute between the parties that the Serbian Orthodox Church was a hierarchical church and that the sole power to remove clerics rested with the governing body that had decided the bishop's case.⁸⁶ Nor was there any question that the matter at issue was a religious dispute of ecclesiastical cognizance.⁸⁷ The Illinois Supreme Court agreed with these stipulations. Nevertheless, the court decided in favor of the defrocked bishop because, in its view, the church's adjudicatory procedures had been applied in an arbitrary manner.⁸⁸ On appeal, the Supreme Court rejected the "arbitrariness" exception to the judicial deference rule of *Watson* when the question concerns church polity or church administration.⁸⁹ When the issue is primarily religious, rather than principally over the control of property, there may be no examination by civil courts into whether the church judicatory body properly followed its own rules of procedure.⁹⁰ No civil court jurisdiction "is consistent with the constitutional mandate [that] the civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."⁹¹ The reasons for this injunction are three-fold. First, civil courts cannot delve into canon or ecclesiastical law.⁹² These matters are too sensitive to permit any civil probing because inquiry may prove too entangling. Second, civil judges have no training in

"probe deeply enough into the allocation of power within a church so as to decide where religious law places control." *Id.* at 369. Second, there is the "formal title" doctrine, used by the Maryland Court of Appeals, requiring study of the local church deed and the church's organic law—charter, constitution, and bylaws. *Id.* at 370. Third, there is the enactment of a statutory approach, carefully drawn to avoid interference in doctrine. *Id.* at 370.

⁸⁴ *Milivojevich*, 426 U.S. 696.

⁸⁵ *Id.* at 709, 713, 720, 721. In *Milivojevich*, the resolution of the claim concerning the clerical office would determine any incidental property questions. *Id.* at 709.

⁸⁶ *Id.* at 715.

⁸⁷ *Id.* at 709.

⁸⁸ See *Serbian E. Orthodox Diocese v. Milivojevich*, 60 Ill. 2d 477, 503, 328 N.E.2d 268, 281-82 (1975), *rev'd*, 426 U.S. 696 (1976).

⁸⁹ *Milivojevich*, 426 U.S. at 712-13. The "arbitrariness" exception had been established by the dictum in *Gonzalez*, 280 U.S. 1, 18. See *supra* notes 64, 82. Presumably the exceptions for "fraud and collusion" still obtain.

⁹⁰ *Milivojevich*, 426 U.S. at 713.

⁹¹ *Id.*

⁹² *Id.*

canonical law.⁹³ Finally, the “[c]onstitutional concepts of due process, involving secular notions of ‘fundamental fairness’” cannot be borrowed from civil law and impressed upon internal church governance consistent with church-state separation.⁹⁴

The Supreme Court also reversed the state court’s disapproval of the diocesan reorganization, holding that the Illinois Supreme Court had relied impermissibly on its “delv[ing] into the various church constitutional provisions” relevant to “a matter of internal church government, an issue at the core of ecclesiastical affairs.”⁹⁵ The enforcement of terms in controlling church documents could not be accomplished “without engaging in a searching and therefore impermissible inquiry into church polity.”⁹⁶

Linking its decision to the Establishment Clause’s “promise of nonentanglement,” the Supreme Court in *Jones v. Wolf*⁹⁷ attempted to delineate more precisely the nature of the neutral-principles-of-law approach suggested in *Presbyterian Church*. *Jones v. Wolf* presented a typical hierarchical church property dispute between a local church, represented by a majority of its congregation, and the general church allied in the lawsuit with a minority faction of the local congregation. A majority of the local congregation adopted a resolution to separate from the general church and then affiliate with a different denomination. The majority faction retained possession of the property and assets of the local church and excluded the minority faction from its affairs. The general church responded by appointing an administrative commission which issued a judgment declaring the minority faction the “true church.” Further, the commission’s ruling purported to retract all of the majority faction’s privileges in continued use of the local church real estate.⁹⁸

Applying a neutral-principles-of-law approach, the Georgia courts reviewed the state statutes on implied trusts, the deeds to the disputed property, the organic law of the church, the corporate charter to the local church, and the constitution of the general church (Book of Church Order).⁹⁹ The state court found nothing implying a trust in favor of the general church. The deeds gave legal title to the local church and its trustees. Without further analysis, the state court awarded title in the property to the majority faction,¹⁰⁰ implying that the Georgia courts presume the majority faction constitutes the “true local congregation” when there is no evidence to the contrary.¹⁰¹

⁹³ *Id.* at 714 n. 8.

⁹⁴ *Id.* at 714-15.

⁹⁵ *Id.* at 721.

⁹⁶ *Id.* at 723.

⁹⁷ *Jones*, 443 U.S. at 604.

⁹⁸ *Id.* at 598-99.

⁹⁹ *Id.* at 601.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 607.

On appeal to the Supreme Court, the minority faction challenged the Georgia presumption in favor of local majority rule. The minority faction argued that at least as to a hierarchical church, the state could not adopt a legal presumption which contradicted a ruling by the general church commission concerning the "true congregation."¹⁰² The Supreme Court, however, approved a majority-rule presumption as part of a neutral-principles-of-law approach, since a "majority faction can be identified without resolving any question of religious doctrine or polity."¹⁰³ Such a legal presumption must be rebuttable, however, in the face of evidence by the minority faction that the relevant documents and state statutes place title to the property elsewhere.¹⁰⁴

The *Jones v. Wolf* Court made clear that the neutral-principles approach was not mandated by the first amendment, but was an alternative to the judicial deference rule of *Watson*.¹⁰⁵ Moreover, when applying the neutral-principles rule, if a civil court examines church documents and finds that they incorporate "religious concepts in the provisions relating to the ownership of property," the courts must defer to the interpretation of the documents given by the authoritative ecclesiastical body.¹⁰⁶

In short, civil authorities must always forego questions which are essentially religious as a matter of noninterference in the affairs of religious associations.¹⁰⁷

¹⁰² *Id.*

¹⁰³ *Id.* The Court in *Jones v. Wolf* noted that problems may occur when the identity of enrolled members, presence of a quorum, or the tally on the final vote are disputed. *Id.*

¹⁰⁴ *Id.* at 607, 608 n. 5. Since the nature of the presumption in *Jones v. Wolf* was unclear, *id.* at 608, or whether Georgia law instead required application of the *Watson* judicial deference rule, *id.* at 608-09, the Court remanded for further proceedings consistent with its opinion. *Id.* at 610.

¹⁰⁵ *Id.* at 602.

¹⁰⁶ *Id.* at 604. In *Jones v. Wolf*, the dissenting justices argued that only the *Watson* judicial deference rule was permitted by the first amendment when disputes arose in hierarchical churches. *Id.* at 616-18 (Powell, J., dissenting).

¹⁰⁷ *Accord, Little*, 106 S. Ct. 1802 (*cert. denied*) (Marshall and Brennan, J.J., dissenting). *Little* involved the schism within a local church of congregational polity over whether a majority of the members had voted to dismiss the pastor. Members who desired to remove the pastor filed suit alleging that a majority had voted to fire the pastor but that he refused to accept that vote and vacate the office. Rather than inquire as to the plaintiffs' claim that they represented the majority faction within the church and that the members had indeed elected to remove the pastor at a properly called congregation meeting with a quorum present, the trial court directed that a new election be held under the auspices of a commissioner appointed by the judge. In dissenting from the Court's denial of certiorari, Justice Marshall stated his view that the trial judge's "action threatens to erode the First Amendment's prohibitions against entanglement between religious and secular authority," *id.* at 1803, and summarized the current state of the law as follows:

Because religious organizations may own property and enter into contracts, it is inevitable that they will become involved in legal disputes. However, where the use of property or the terms of contracts necessitate reference to ecclesiastical principles or authority, courts must exercise extreme care to avoid taking sides on matters of religious belief....[T]he *Watson* approach is simple. A court may apply neutral principles of secular law to the dispute at hand. When that process requires a court to determine the validity of a church decision, the court ordinarily must discern from the relevant canonical law what body is authorized

Included in such matters are doctrine, discipline, appointment and removal of religious personnel, church polity, internal administration, and religious practice. In disputes principally over control of real estate, however, states may adopt a neutral-principles-of-law approach so long as civil judges do not become entangled in questions essentially religious in the course of the rule's application.

2. Establishment Clause

The wall of separation erected by the Establishment Clause, although not impermeable, theoretically screens out undue traffic originating from either side. Supreme Court opinions are replete with statements, albeit *obiter dicta*, that the Establishment Clause filters out improper involvement traveling in either direction.¹⁰⁸

The Supreme Court has been active in Establishment Clause cases that determine impermissible state aid to religion, but seemingly has avoided cases that have offered the Court the opportunity squarely to hold that the clause cuts both ways, thus prohibiting governmental intrusion into the concerns of pervasively sectarian associations as well.¹⁰⁹ In *NLRB v. Catholic Bishop of*

to make a particular decision within the church, and what decision that body has reached. Having done so, the court may not inquire whether the decision was made arbitrarily or whether it conflicts with the ecclesiastical precepts of that organization.

Id. at 1803.

¹⁰⁸ Consider, for example: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances *nor inhibits religion*." *Schempp*, 374 U.S. at 222 (emphasis added). "[T]he purposes underlying the Establishment Clause go much further than [preventing coercive pressure on religious minorities]. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government *and to degrade religion*." *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (emphasis added). "The objective is to prevent, as far as possible, the intrusion of either [state or religion] into the precincts of the other." *Lemon*, 403 U.S. at 614. "The purposes of the First Amendment guarantees relating to religion were twofold: *to foreclose state interference with the practice of religious faiths*, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems. Religion and government each insulated from the other, could then co-exist." *Larkin*, 459 U.S. at 122 (emphasis added). See also *Walz v. Tax Comm'n*, 397 U.S. 664, 669-70 (1970) (emphasis added):

[R]igidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited.... [W]e will not tolerate either governmentally established religion or *governmental interference with religion*.... [T]here is room for...a benevolent neutrality which will permit religious exercise to exist without sponsorship and *without interference*.

Each value judgment...must...turn on whether particular acts in question are intended to establish or *interfere with* religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality...has prevented the kind of involvement that would tip the balance toward *government control of churches or governmental restraint on religious practices*.

¹⁰⁹ Churches and other pervasively sectarian organizations (see *infra* note 123) are to be distinguished from those that are primarily commercial in nature, even if connected to a religious organization. See *Alamo Foundation v. Secretary of Labor*, 105 S. Ct. 1953 (1985). In *Alamo* the Court turned back a first amendment challenge to the application of federal minimum wage and maximum

Chicago,¹¹⁰ the Supreme Court came closest to affording Establishment Clause protection from governmental regulation,¹¹¹ but the Court dodged a determination of whether or not the government's actions were unconstitutional.¹¹² Although the broad language in the National Labor Relations Act clearly included religious schools within its scope, the Court conceived a new rule of construction, holding that it would not assume that Congress intended to regulate parochial schools unless it had expressed so specifically. The constitutional question, therefore, never was reached. Nevertheless, *Catholic Bishop* stands for the proposition that the prospect of National Labor Relations Board (NLRB) jurisdiction over lay parochial school teachers raises "difficult and sensitive questions" and a "significant risk" that the separation principle would be infringed.¹¹³ The first amendment problems anticipated by the Court in *Catholic Bishop* concerned heavy involvement by government employees in religious affairs. The majority opinion discussed two examples. The first was an unfair labor practice charge defended on the basis that the practice was required by religious faith. Such a charge would involve the NLRB in a determination of the good faith of the defense and its relationship to the religious mission of the school.¹¹⁴ Second, the National Labor Relations Act makes all terms and conditions of employment subject to mandatory collective bargaining. The all-inclusive scope of the Act necessarily "implicate[s] sensitive

hour legislation to the business operations of a nonprofit religious organization. Although the Alamo Foundation did have a religious purpose for many of its activities, the Court properly did not exempt those operations "which include service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a record keeping company, a motel, and companies engaged in the production and distribution of candy." *Id.* at 1957. The Court took care to say that *Alamo* presented a different problem from the parochial schools in *Catholic Bishop*. *Id.* at 1960 n. 18. A distinction between pervasively sectarian organizations (*infra* note 123) and commercial operations is inevitably an important factor in the calculus that parses associations with intrinsic sociopolitical value from other associations formed largely for commercial reasons. See *Roberts*, 464 U.S. at 634 (O'Connor, J., concurring) (drawing distinction between ideological and commercial organizations); *Hishon v. King & Spalding*, 467 U.S. 69, 80-81 n. 4 (1984) (Powell, J., concurring). Echos of this commercial—ideological dichotomy are heard in the Court's less rigorous protection of commercial speech. See, e.g., *Zauderer v. Dicipinary Counsel*, 105 S. Ct. 2265, 2274-75 (1985); *Central Hudson Gas & Elec. Corp. v. Public Service Comm.*, 447 U.S. 557, 562-63 (1980).

¹¹⁰ *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). See generally *Durso & Brice, NLRB v. Catholic Bishop of Chicago: Government Regulation Versus First Amendment Religious Freedom*, 24 St. Louis U.L.J. 295 (1980); *Pfeffer, Unionization of Parochial School Teachers*, 24 St. Louis U.L.J. 273 (1980).

¹¹¹ See *McDaniel v. Paty*, 435 U.S. 618, 636 (1978) (Brennan, J., concurring) (legislative ban on cleric holding public office "manifests patent hostility toward, not neutrality respecting, religion; forces or influences a minister or priest to abandon his ministry as the price of public office; and, in sum, has a primary effect which inhibits religion."); *Ohio Civil Rights Comm. v. Dayton Christian Schools*, 106 S. Ct. 2718 (1986) (case remanded on jurisdictional grounds, thus obviating necessity of ruling on establishment clause challenge to application of sex discrimination laws to teachers in parochial school).

¹¹² *Catholic Bishop*, 440 U.S. at 502.

¹¹³ *Id.* at 502, 507. Cf. *Alamo Foundation*, 105 S. Ct. at 1960, n. 18 (no such risk when dealing with commercial operations of otherwise religious organization).

¹¹⁴ *Catholic Bishop*, 440 U.S. at 502.

issues that open the door to conflicts" between organized religion and government.¹¹⁵ Since the Roman Catholic schools resisting federal regulation in *Catholic Bishop* were the very entities the Court deemed too religious to be proper recipients of state aid in numerous cases from *Lemon v. Kurtzman*¹¹⁶ to *Byrne v. Public Funds for Public Schools of New Jersey*,¹¹⁷ it is understandable that the Court would not be so double-minded as to permit parochial schools to be regulated by the NLRB. Nevertheless, the hesitance to ground the holding squarely on the establishment clause is puzzling.¹¹⁸

The final element in the tripartite test in *Lemon v. Kurtzman*¹¹⁹ is the injunction against excessive entanglement between religious organizations and government. An entanglement analysis is necessarily a balancing of interests. As the Supreme Court stated in *Roemer v. Board of Public Works*:¹²⁰ "[t]here is no exact science in gauging the entanglement of church and state. The wording of the test. . . itself makes that clear. The relevant factors we have identified are to be considered 'cumulatively' in judging the degree of entanglement."¹²¹

There are three factors to which the Court has directed attention.¹²² Each factor was fashioned in public aid cases, but is logically applicable in a claim of undue interference with religious associations. The first factor concerns the purposes of the organization which is benefited or inhibited. If the religious organization is "pervasively sectarian,"¹²³ it is unlikely that the governmental contact

¹¹⁵ *Id.* at 502-03.

¹¹⁶ *Lemon*, 403 U.S. 602 (1971).

¹¹⁷ *Byrne v. Public Funds for Public Schools of New Jersey*, 590 F.2d 514 (3d Cir.), *aff'd*, 442 U.S. 907 (1979).

¹¹⁸ The innovation by the slim majority in fashioning a new rule of construction is pointed out by the four dissenting justices: "[The majority's] construction is plainly wrong in light of the Act's language, its legislative history, and this Court's precedents. It is justified solely on the basis of a canon of statutory construction seemingly invented by the Court for the purpose of deciding this case." *Catholic Bishop*, 440 U.S. at 508 (Brennan, J., dissenting). See *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981). In *St. Martin*, a more orthodox canon of construction was utilized to circumvent the establishment clause question which would arise if unemployment taxes were assessed against church-affiliated schools. *Id.*

¹¹⁹ *Lemon*, 403 U.S. 602. The entire *Lemon* test is framed as follows:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion... finally, the statute must not foster an excessive government entanglement with religion. *Id.* at 612-13 (citations omitted).

¹²⁰ *Roemer v. Bd. of Public Works*, 426 U.S. 736 (1976) (plurality opinion).

¹²¹ *Id.* at 766.

¹²² *Id.* at 748; *Lemon*, 403 U.S. at 615.

¹²³ *Roemer*, 426 U.S. at 758. In *Roemer*, the Supreme Court turned back a challenge to the constitutionality of a state funding program which afforded noncategorical grants to eligible colleges and universities, including sectarian institutions that awarded more than just seminarian or theological degrees. In discussion focused on the fostering of religion, but equally applicable to the inhibition of organized religious bodies, the Supreme Court said:

[T]he primary-effect question is the substantive one of what private educational activities,

is permissible. Second, courts examine the nature of the aid provided or the regulations imposed by the government. If the regulation provides the public official with sufficient discretion to trespass upon sectarian concerns, the involvement is likely prohibited. Third, the Court has focused on the resulting relationship between government and the religious authority. If that relationship is one requiring continued surveillance by public officials, the entanglement is likely excessive. Concerning all three elements, the overriding principle is to avoid governmental involvement where there is an "appreciable risk" that the contact will be "used to transmit or teach [or inhibit] religious views."¹²⁴

The exemption for churches from the payment of real estate taxes was upheld by the Supreme Court in *Walz v. Tax Commission*¹²⁵ in part because exemption

by whatever procedure, may be supported by state funds. *Hunt* [v. *McNair*, 413 U.S. 734 (1973)] requires (1) that no state aid at all go to institutions that are so "pervasively sectarian" that secular activities cannot be separated from sectarian ones, and (2) that if secular activities can be separated out, they alone may be funded.

Roemer, 426 U.S. at 755 (emphasis in original).

The Baptist college in *Hunt* and the Roman Catholic colleges in *Roemer* were held not to be "pervasively sectarian." The record in *Roemer* supported findings that the institutions employed chaplains who held worship services on campus, taught mandatory religious classes, and started some classes with prayer. In addition, there was a high degree of autonomy from the Roman Catholic Church, the faculty was not hired on a religious basis and had complete academic freedom except in religious classes, and students were chosen without regard to their religion. The challenged state aid in *Hunt* was for the construction of secular college facilities. The legislation granted the authority to issue revenue bonds. The Court upheld the legislation, commenting on the primary-effect test:

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise secular setting.

Hunt, 413 U.S. at 743.

A comparison of the colleges in *Roemer* and *Hunt* with the elementary and secondary schools in *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 767-68 (1973), will help to clarify the term "pervasively religious." The parochial schools in *Nyquist*, found to be pervasively religious, conformed to the following profile: the schools placed religious restrictions on student admissions and faculty appointments, they enforced obedience to religious dogma, they required attendance at religious services, they required religious or doctrinal study, the schools were an integral part of the religious mission of the sponsoring church, they had religious indoctrination as a primary purpose, and they imposed religious restrictions on how and what the faculty could teach. The state aid in *Nyquist* was held to be prohibited by the establishment clause. *Accord*, *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216, 3223 n. 6 (1985); *Aguilar v. Felton*, 105 S. Ct. 3232, 3238 and n. 8 (1985).

Although the foregoing "pervasively sectarian" analysis was formulated in the context of the primary-effect element of the *Lemon* test, the primary-effect and nonentanglement elements often require study of the same facts and relationships. *Roemer*, 426 U.S. at 768-69 (White, J., dissenting). The distinction is that the primary-effect element keys on whether sectarian interests are advanced or inhibited to a measurable degree. Nonentanglement focuses on the resulting interrelationship or structure between government and church. *Id.* at 754-55.

¹²⁴ *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 662 (1980). See *Grand Rapids School Dist.*, 105 S. Ct. at 3225 ("[R]espondents adduced no evidence of specific incidents of religious indoctrination in this case. . . . But the absence of proof of specific incidents is not dispositive.").

¹²⁵ *Walz*, 397 U.S. at 674-76.

occasioned a lesser degree of entanglement between government and religion than imposition of the tax. Elimination of the exemption would necessitate property valuation, tax liens, and nonpayment foreclosures. Importantly, the Court was unwilling to justify the exemption on the *quid pro quo* of churches providing social welfare services to the community. A *quid pro quo* requirement would have caused "governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a continuing day-to-day relationship" which is undesirable.¹²⁶

*Gillette v. United States*¹²⁷ presented a classic example of the entanglement concept used to avoid the involvement of government in difficult classifications of religious concerns. The petitioners in *Gillette* claimed that limiting the statutory exemption from conscription to those who objected to all wars violated the Establishment Clause because the exemption discriminated against religious faiths which permitted fighting in only "just wars." The Court rejected the claim, noting that the "petitioners ask for greater 'entanglement' by judicial expansion of the exemption to cover objectors to particular wars."¹²⁸ The Court reasoned that "the more discriminating and complicated the basis of classification for an exemption" . . . the greater the potential for state involvement" in determining the character of persons' belief and affiliations, thus "entangl[ing] government in difficult classifications of what is or is not religious," or what is or is not conscientious.¹²⁹

In *Lemon v. Kurtzman*,¹³⁰ the Supreme Court first stated the nonentanglement concept as a facet of the Court's Establishment Clause test separate from the legislative purpose and primary-effect elements. The state programs to aid religious schools in *Lemon* had erected several regulatory controls to ensure that funds and state services did not aid sectarian activities. The regulatory bulwark, however, ran afoul of the entanglement test. *Lemon* involved statutes from both Rhode Island and Pennsylvania. The Rhode Island program affected only Roman Catholic schools which were found to engage in substantial religious activity and to have as a purpose inculcation of the Catholic faith.¹³¹ The legislation supplemented the salaries of teachers who were under religious authority and control, and who had responsibilities which "hover on the border between secular and religious

¹²⁶ *Id.* at 674.

¹²⁷ *Gillette v. United States*, 401 U.S. 437 (1971).

¹²⁸ *Id.* at 450.

¹²⁹ *Id.* at 457 (citations omitted). "While the danger of erratic decisionmaking unfortunately exists in any system of conscription that takes individual differences into account, no doubt the dangers would be enhanced if a conscientious objection of indeterminate scope were honored in theory." *Id.* at 458. See *Bob Jones University*, 461 U.S. at 604 n. 30 (1983) (entanglement avoided when tax exemption denied to all schools on neutral basis regardless whether racial policies had a religious motive or not).

¹³⁰ *Lemon*, 403 U.S. at 612-13. See generally Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195 (1980).

¹³¹ *Lemon*, 403 U.S. at 615-16.

orientation" of pupils.¹³² No actual advancement of religion was shown, and the mere presence of this hazard was sufficient. To prevent aiding religion, Rhode Island had provided for "comprehensive, discriminating, and continuing state surveillance" over the activities of qualified teachers.¹³³ The textbooks and other materials had to be those used in the public schools. In certain events, the statute called for examination of school records to determine amounts spent on secular as opposed to religious education, causing state evaluation of the religious content of a church-related program.¹³⁴ The Pennsylvania statute shared the entanglement problems of the Rhode Island statute. Additionally, it provided direct monetary aid to parochial schools with the attendant post-audit inquiries to ensure that no cash was spent on "subjects of religion, morals, or forms of worship."¹³⁵

In *Tilton v. Richardson*,¹³⁶ decided the same day as *Lemon*, the Supreme Court upheld public construction grants for college and university facilities. Although the colleges assisted by the grants were church-affiliated, the *Tilton* Court found no impermissible entanglement. The Court distinguished *Tilton* from *Lemon*, holding that the aid in the form of capital improvements was religiously neutral, therefore not requiring surveillance to prevent diversion to sectarian use. Further, the grant was a one-time, single-purpose event, which engendered no continuing relationship.¹³⁷ Finally, the institutions involved were considerably less permeated with sectarian purpose.¹³⁸

In companion parochial-aid cases, *Levitt v. Committee for Public Education*¹³⁹ and *Committee for Public Education v. Nyquist*,¹⁴⁰ the Supreme Court invalidated several New York law provisions. Specifically, the *Levitt* Court held unconstitutional the reimbursement of the costs of state-required testing and record keeping. No attempt was made in the statute to ensure that the teacher-prepared tests were free of religious instruction and inculcation of religious precepts, and none could be constitutionally fashioned which would not become entangling.¹⁴¹ In

¹³² *Id.* at 618.

¹³³ *Id.* at 619.

¹³⁴ *Id.* at 619-20. The *Lemon* Court also expressed concern about disagreements that may arise between teachers and the religious authorities over the meaning of regulatory restrictions. *Id.*

¹³⁵ *Id.* at 620-21. The Pennsylvania statutory scheme again came before the Court in *Lemon v. Kurtzman*, 411 U.S. 192 (1973). The issue presented was the retroactive application of the Court's 1971 decision to expenses already incurred by parochial schools in reliance on the state legislation. A majority held that the 1971 ruling striking the programs should not be retroactively applied, thus releasing a payment of some \$24 million to church schools. Payment of the disputed sum would compel no further state oversight of the instructional processes. Only a single post-audit was required, entailing no continuing relationship, and any payments would not reoccur. *Id.* at 201-02.

¹³⁶ *Lemon*, 403 U.S. 672 (1971).

¹³⁷ *Id.* at 687-88.

¹³⁸ *Id.* at 681-82, 685-87.

¹³⁹ *Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472 (1973).

¹⁴⁰ *Nyquist*, 413 U.S. 756 (1973).

¹⁴¹ *Levitt*, 413 U.S. at 479-80. The *Levitt* Court made no finding that the funds were actually used to teach religion, but found a "substantial risk" sufficient to violate the Establishment Clause. *Id.* at 480.

In a sequel to *Levitt*, the case of *New York v. Cathedral Academy*, 434 U.S. 125 (1977), turned

Nyquist, the Supreme Court reaffirmed the constitutional validity of loaning secular textbooks, but disallowed state reimbursement for building maintenance, tuition reimbursement, and income tax credits to parents paying tuition.¹⁴² Nothing in the statute in *Nyquist* barred a school from diverting the funds it received for maintenance to a religious purpose, and no restrictions were possible without violating the entanglement criteria.¹⁴³ To ensure nonsectarian use of the funds, the state would have had to conduct frequent audits and make other incursions into a church school's financial matters.¹⁴⁴

The Supreme Court found that South Carolina's program to assist church-related colleges through the issuance of revenue bonds bordered on excessive entanglement in *Hunt v. McNair*.¹⁴⁵ Since the benefited institution was a Baptist college, it closely approximated those schools profiled in *Tilton*. The Court, however, was concerned that the legislation enabled the administering agency to "become deeply involved in the day-to-day financial and policy decisions of the college."¹⁴⁶ The South Carolina Supreme Court had defused the problem by giving the legislation a narrow interpretation restricting the agency's power unless there was a default on the bonds by the college.¹⁴⁷ The state administrators, therefore, exercised no discretion over the colleges' operations or fiscal policy absent the unlikely event of a default.

back an attempt to reimburse parochial schools for testing and record-keeping expenses incurred between the time of the enactment of a state-aid statute and the time it was struck down in *Levitt*. The prospect of even a one-time audit to determine if the expenditures were utilized for sectarian purposes would entangle the state and the civil courts in an "essentially religious dispute." In essence, the audit would compel the state auditors to pry into possible religious content of classroom examinations written by parochial school teachers. *Id.* at 132-33.

¹⁴² In a case that presented an issue similar to one in *Nyquist*, the Court in *Mueller v. Allen*, 463 U.S. 388 (1983), upheld a Minnesota tax deduction for parents who incurred expenses of tuition, textbooks, and transportation on behalf of their children attending elementary or secondary schools. *Nyquist* was distinguished on the basis that the Minnesota statute provided the deduction to all parents whether their children attended public or private schools. *Id.* at 397. Moreover, there was no entanglement between Minnesota and the religious schools because any benefits to the schools came only as "a result of numerous, private choices of individual parents of school-age children." *Id.* at 399. The *Mueller* Court also held that the "political divisiveness" aspect of the entanglement test (see *infra* note 184) was not violated and "must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or teachers in parochial schools." *Id.* at 403 n. 11.

¹⁴³ *Nyquist*, 413 U.S. at 774. In *Nyquist*, the tuition tax and reimbursement schemes were found to violate the primary-effect test. *Id.* at 780, 794.

¹⁴⁴ In *Meek v. Pittenger*, 421 U.S. 349 (1975), a state law providing aid to church-related schools was again before the Court. The Court continued to uphold the lending of secular textbooks, but it rejected the provision of counseling, remedial classes, and therapy by public school professional staff on the parochial school campus. Surveillance would be required to ensure that religious instruction not become part of the professional's activity, and such surveillance would constitute impermissible entanglement. *Id.* at 369-72. The *Meek* Court also noted the potential for conflict between the public employees and religious authorities. *Id.* at 372 n. 22.

¹⁴⁵ *Hunt v. McNair*, 413 U.S. 734 (1973).

¹⁴⁶ *Id.* at 747. The concern of over-involvement was not that it might actually happen, but that there was a "realistic likelihood" that it could happen. *Id.*

¹⁴⁷ *Id.* at 747-48.

In *Roemer v. Board of Public Works*,¹⁴⁸ the Court continued its practice of permitting aid to church-related colleges, upholding noncategorical grants in the form of annual subsidies. A plurality of the Court held that the aid did not foster an entanglement with religion because the colleges in question performed essentially secular educational functions; the annual payment did not alone implicate excessive entanglement; and the possibility of occasional audits was not likely to be more entangling than inspections and audits involved in the course of normal college accreditation inspections by the state.¹⁴⁹ The case draws a sharp distinction between the "pervasively sectarian" primary and secondary schools such as those in *Lemon*, and the church-affiliated colleges in *Tilton*, *Hunt*, and *Roemer*.¹⁵⁰

*Grand Rapids School District v. Ball*¹⁵¹ and *Aguilar v. Felton*¹⁵² comprise the Court's most recent look at aid to parochial schools. In *Grand Rapids*, a local school district had adopted two programs, called Shared Time and Community Education, that provided classes to parochial school students at taxpayer expense in classrooms located in and leased from the local parochial schools.¹⁵³ Because the schools involved were "pervasively sectarian,"¹⁵⁴ and because the Establishment Clause is violated when there is a "substantial risk" that public funds be used to inculcate religion,¹⁵⁵ the Court found the two programs had the primary effect of advancing religion. Moreover, insofar as religion was taught to parochial school children with the assistance of government funds, the message of the church sponsoring the school was compromised by "tainting the resulting religious beliefs with a corrosive secularism."¹⁵⁶

Aguilar was decided the same day as *Grand Rapids* and struck down a federal education program that paid the salaries of public school employees who taught

¹⁴⁸ *Roemer*, 426 U.S. 736 (plurality opinion).

¹⁴⁹ *Id.* at 762-65.

¹⁵⁰ In the next two pronouncements by the Supreme Court on the continuing parochial-aid controversy, the church-related schools were more successful. In *Wolman v. Walter*, 433 U.S. 229 (1977), the Court upheld therapeutic, remedial, and guidance counseling held at sites away from the parochial school campus, diagnostic services provided at the parochial school campus, and standardized tests and test scoring provided by nearby public schools. The Court rejected as unconstitutional the financing of field trips and the provision of classroom educational equipment. In *Regan*, 444 U.S. 646, the Court upheld state reimbursement of the costs for the administration by parochial schools of state-prepared tests and the keeping of official records. In *Regan*, the state had avoided the entanglement pitfalls by directing its aid to secular services which are "discrete and clearly identifiable" so as to permit straightforward and routine reimbursement with little danger of excessive entanglement. *Id.* at 660-61. In *Wolman*, the services for which the Court prohibited state aid could be diverted to sectarian use. Any administrative controls to prevent improper use of the aid would be too entangling. 433 U.S. at 254.

¹⁵¹ *Grand Rapids*, 105 S. Ct. 3216.

¹⁵² *Aguilar*, 105 S. Ct. 3232.

¹⁵³ *Grand Rapids*, 105 S. Ct. at 3218-20.

¹⁵⁴ *Id.* at 3223.

¹⁵⁵ *Id.* at 3225.

¹⁵⁶ *Id.* at 3224.

low-income, educationally deprived children enrolled in public or private schools.¹⁵⁷ Insofar as the program aided parochial schools, the Court held that the aid violated the Establishment Clause because of excessive entanglement between church and state.¹⁵⁸ In order to insure that public funds not aid religion, the educational law adopted a system of monitoring in the parochial schools. In thereby avoiding the effect of aiding religion, however, the monitoring created a permanent and pervasive state presence in the sectarian schools receiving the aid.¹⁵⁹ The prohibition on excessive entanglement was said to be rooted in two concerns: freedom of religious belief for those not aided by the state, and an equal concern to safeguard "the freedom of even the adherents of the denomination [aid by the state from being] limited by the governmental intrusion into sacred matters."¹⁶⁰ Thus, the Court in *Aguilar* again reiterated that the church-state separation embodied in the Establishment Clause is for the mutual benefit of both.

The recurring themes of avoiding governmental involvement in the task of classifying religious practices and of avoiding the monitoring of religious ministries were brought together in *Widmar v. Vincent*.¹⁶¹ Although permitting use of university buildings and other facilities by student groups, the state university in *Widmar* sought to justify barring use by student groups that had a religious purpose. On the basis of speech and associational freedoms, the Supreme Court upheld the right of student groups with a religious focus to use university facilities on an equal basis with all other student groups.¹⁶² The lone dissenter, Justice White, argued that the Establishment Clause permitted the university to bar use of public facilities for "religious worship," although he agreed "religious speech" could not be excluded based on the Court's precedents prohibiting content-based censorship.¹⁶³ The majority rejected the suggested distinction between "worship" and "religious speech" for entanglement reasons. The Court pointed out that the distinction would (1) compel the state university "to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith,"¹⁶⁴ and (2) foster "a continuing need to monitor group meetings to ensure compliance with the rule."¹⁶⁵

Although nonentanglement¹⁶⁶ and the avoidance of the civil resolution of intrafaith disputes¹⁶⁷ are often viewed as distinct doctrinal developments, they spring from the same underlying principle: government must avoid any involvement with

¹⁵⁷ *Aguilar*, 105 S. Ct. at 3234-35.

¹⁵⁸ *Id.* at 3237.

¹⁵⁹ *Id.* at 3237-38.

¹⁶⁰ *Id.* at 3237.

¹⁶¹ *Widmar v. Vincent*, 454 U.S. 263 (1981).

¹⁶² *Id.* at 268-69.

¹⁶³ *Id.* at 283-84 (White, J., dissenting).

¹⁶⁴ *Id.* at 269 n.6. See also *id.* at 271 n.9, 272 n.11.

¹⁶⁵ *Id.* at 272 n.11.

¹⁶⁶ *Walz*, 397 U.S. at 674.

¹⁶⁷ *Watson*, 80 U.S. (13 Wall.) 679.

pervasively sectarian societies that may touch upon the matters central to their religious identity and mission. These matters are so highly reactive when placed in contact with civic authority that religious liberty requires that any appreciable risk¹⁶⁸ of interference be avoided.

3. Free Exercise Clause

A useful parallel may be drawn between the concern that government not unduly involve itself with organized religion and the Supreme Court's treatment of claims under the Free Exercise Clause. As a threshold inquiry in every Free Exercise Clause case, the claimant must show that his religious belief is sincerely held.¹⁶⁹ Some objective evidence of sincerity is required, lest a free exercise claim become a basis for fraud or too ready an excuse for avoiding many unwanted civic obligations. Nevertheless, the sincerity test is necessarily a truncated exercise in fact-finding because of the injunction against civil authorities testing the truth of one's faith.¹⁷⁰ The Court has said that only claims "so bizarre, so clearly nonreligious in motivation" should be denied free exercise credence.¹⁷¹ Stated differently, sincerity is not so much a test of what a person believes, but whether one really believes it—a fervency test.

Of course, religious organizations are not immune from criminal prosecution¹⁷² nor are they exempt from civil suits where acts such as false imprisonment have caused personal injury.¹⁷³ The claims of religious fraud and intentional infliction of mental distress allegedly caused by the purveying of false religious doctrine are more problematic.¹⁷⁴ In *United States v. Ballard*,¹⁷⁵ a criminal prosecution for

¹⁶⁸ The term "appreciable risk" was adopted from *Regan*, 444 U.S. at 662, where the Court noted that certain state aid to parochial schools did not result in any "appreciable risk" of government entanglement in the schools ability to inculcate its religious values. See *infra* note 124 (discussion of *Regan*). The Court has been quite consistent in the rule that the Establishment Clause is violated when there is only a risk of church-state conflict. See, e.g., *Levitt*, 413 U.S. at 480 ("the potential for conflict inheres in this situation"). See also *Larkin*, 459 U.S. at 125.

¹⁶⁹ See, e.g., *Yoder*, 406 U.S. at 218 (compulsory school attendance claimed to be "at odds with fundamental tenets of their religious beliefs"); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (not working on Saturday claimed to be "a cardinal principle of her religious faiths").

¹⁷⁰ *United States v. Seeger*, 380 U.S. 163, 185 (1965); *United States v. Ballard*, 322 U.S. 78, 86-87 (1944).

¹⁷¹ *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707, 714-15 (1981).

¹⁷² See, e.g., *Chatwin v. United States*, 326 U.S. 455 (1945) (bona fide religious beliefs do not absolve one from conviction under federal kidnapping act); *See United States v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981), *cert. denied sub nom. Hubbard v. United States*, 456 U.S. 926 (1982) (alleged criminal violations of theft of Department of Justice Documents); *cf. Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969) (attempted condemnation of religious artifact and literature for false and misleading labeling pursuant to Food, Drug and Cosmetic Act).

¹⁷³ See, e.g., *George v. International Soc'y of Krishna Consciousness*, No. 27-75-65 (Cal. Super. Ct., Orange Cty., reported in 5 NAT'L. L.J. 6 (June 6, 1983)) (civil suit alleging "brainwashing and false imprisonment"). See *infra* note 666 and accompanying text.

¹⁷⁴ See *infra* notes 655-675 and accompanying text.

¹⁷⁵ *Ballard*, 322 U.S. 78. *Ballard* involved a religious movement called "I Am," founded by Guy

mail fraud, the Supreme Court held that the judicial system could never place the burden on a defendant to prove the truth or falsity of his religious beliefs.¹⁷⁶ The principal elements of fraud are proof that a defendant knowingly made a representation and that it was false. Proof of these two elements runs counter to *Ballard* when the statements said to be false relate to religious faith. Plaintiffs alleging tortious fraud frequently seek to circumvent the holding in *Ballard* by sifting out the secular representations from the religious and founding their claim of tortious fraud only on the secular statements.¹⁷⁷ The Free Exercise Clause problem soon catches up with this distinction, however, because many of the representations involved cannot easily be categorized as religious or secular. Common sense, of course, dictates that certain representations are clearly secular or clearly religious. Justice Jackson, dissenting in *Ballard*, gives the example of an action for false representation where a charlatan raises funds to construct a church when in fact donations are being diverted to personal use.¹⁷⁸ Such representations are secular and thus do not implicate free exercise concerns of faith and religious experience. Thus, not every promise by a religious organization or cleric is immune from legal process, including claims in tort. As to those representations that are

and Edna Ballard and their son. The Ballards were convicted in federal district court for using, and conspiring to use, the mails to defraud. Through supernatural powers, the Ballards had represented that they could heal persons of diseases, some ordinarily classified as incurable. They had also claimed to have cured hundreds of persons afflicted with these ailments.

¹⁷⁶ *Id.* at 86-87. Justice Douglas, writing for the Court in *Ballard*, sounded a ringing tribute to freedom of belief:

Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. Board of Education v. Barnette, 319 U.S. 624. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. *Id.*

Id.

¹⁷⁷ See *Christofferson*, 644 P.2d at 597-600; *Van Schiack*, 535 F. Supp. at 1141; both discussed *infra* at notes 659-61, 667-68, 671-72 and accompanying text.

¹⁷⁸ *Ballard*, 322 U.S. at 95 (Jackson, J., dissenting).

quasi-religious, however, adherence to the *Ballard* rule prohibits most attempts to sort them out, and dismisses those representations stemming from religious belief and making actionable the rest. The courts must refuse to engage in such delicate probing because either the inquiry is impossible or fraught with the likelihood of error. When a representation is arguably religious,¹⁷⁹ the matter is not cognizable in fraud for first amendment reasons. This accords with the Supreme Court's repeated warnings to avoid engaging in the classification of religious conduct.¹⁸⁰ Necessarily, this means that certain wrongs will go without civic remedy, but with the high purpose of not doing even greater harm to constitutional freedoms.

The Court has also stated that the Free Exercise Clause does not permit public officials to become embroiled in qualitative assessments of professions of religious duty. For example, in *United States v. Lee*,¹⁸¹ the government conceded that the claimant, a member of the Old Order Amish sect, objected on religious grounds to payment of social security taxes on behalf of his employees. No challenge was made to the sincerity of Lee's religious beliefs. The government, however, sought to challenge the centrality of this conviction, that is, the importance the Amish faith placed on the belief that they should provide for their own elderly and needy and, therefore, their opposition to participation in the national social security system. The *Lee* Court said:

[T]he government [contends] that payment of social security taxes will not threaten the integrity of the Amish religious belief or observance. It is not within "the judicial function and judicial competence," however, to determine whether [Lee] or the government has the proper interpretation of the Amish faith; "[courts] are not arbiters of scriptural interpretation."¹⁸²

The Supreme Court's reluctance to have civil courts delve either into the objective truth of religious doctrine (*Ballard*) or even its centrality to a claimant's system of belief (*Thomas* and *Lee*) is further evidence of the importance the Court places in the separation of state from the activities of worship, discipline, or teaching of the tenets of faith held by religious associations.

¹⁷⁹ See L. TRIBE, *supra* note 45 at 828. Cf. *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981) (only religious claims which are "bizarre" are without protection under the first amendment).

¹⁸⁰ See *supra* notes 106-107 and accompanying text, and *infra* note 181.

¹⁸¹ *United States v. Lee*, 455 U.S. 252 (1982). See also *Goldman v. Weinberger*, 106 S. Ct. 1310, 1316 (1986) (Stevens, J., concurring), arguing that U.S. Air Force regulations against wearing visible religious garb was not only consistent with the free exercise clause due to the special needs of military discipline, but also desirable because the rule is neutral, thereby keeping superior officers away from making evaluations concerning the character of a religious adherent's request for exception to the Air Force rule on the basis of a multifactor test consisting of "functional utility, health and safety, and the goal of a polished, professional appearance." *Id.* at 1315.

¹⁸² *Lee*, 455 U.S. at 257 (citations omitted). Until *Thomas*, it was thought that the Court also required the claimant to show that this belief was central to his faith. See, e.g., *Yoder*, 406 U.S. at 218; *Sherbert*, 374 U.S. 398, 406 (1963); L. TRIBE, *supra* note 45 at 859-65. It is now clear, however, that centrality is not required. *Lee*, 455 U.S. at 257; *Thomas*, 450 U.S. at 715-16.

4. Freedom of Expression

The American Republic is neither a sectarian state, nor is it a radically secular government. The power of the sovereign lies in the first instance in "the people." The people, however, as the ultimate repose of civic power are in turn ruled by the ideas and ideals which have captured their hearts and minds. When ideas are in conflict, truth is to be sought by permitting unhindered debate. All citizens and organizations, including the religious, bear a heavy responsibility to contend for the truth. As the Supreme Court acknowledged in *Walz v. Tax Commission*,¹⁸³ "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues including. . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."¹⁸⁴ The role of the liberal state is to keep the public arena—the marketplace of ideas—open for unhindered debate.¹⁸⁵ And the principal burden of keeping the channels of communication clear falls on the free speech and press clauses of the first amendment.¹⁸⁶

To be sure, the right of free expression is limited by the Establishment and Free Exercise Clauses. For example, should religious organizations ever be successful in imposing their efforts at creedal propagation or inculcation through the force of civil law, the Establishment Clause would be violated.¹⁸⁷ Likewise, should legislation attempt to coerce personal faith, a mode of worship, or a particular religious practice, the Free Exercise Clause would be violated.¹⁸⁸

¹⁸³ *Walz*, 397 U.S. 664.

¹⁸⁴ *Id.* at 670.

The problem of "political divisiveness" is occasionally combined with nonentanglement principles in the Court's discussion. Assessing "[p]olitical fragmentation...on religious lines," *Lemon*, 403 U.S. at 623, dictates examining whether the community served is local or widely dispersed, the intrusion involves primarily religious bodies or those of no religious affiliation, and the degree of autonomy from the sponsoring church. *Roemer*, 426 U.S. at 765-66 (plurality opinion); *Tilton v. Richardson*, 403 U.S. 672, 688-89 (1971). The aim is to avoid what is loosely described by the Court as the "risk of politicizing religion." *Larson v. Valente*, 456 U.S. 228, 254 (1982).

For reasons of freedom of expression, the political divisiveness test has been severely criticized. See, e.g., Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205 (1980); Ball *What is Religion?*, 8 THE CHRISTIAN LAWYER 7, 12-13 (1979). If taken literally, the "political divisiveness" test runs counter to the freedom of speech for religious organizations. As suggested by *Walz*, religious organizations cannot be excluded from common discourse where organized religion along with others articulate their values, visions, and hopes. In *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Lynch v. Donnelly*, 465 U.S. 668, 683-85 (1984), the Court all but eliminated the "political divisiveness" inquiry by downgrading its relevance to little more than a warning that the matter should be given additional scrutiny. *Id.* at 689 (O'Connor, J., concurring) ("[T]he constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself.").

¹⁸⁵ NIMMER ON FREEDOM OF SPEECH § 1.02 (1984).

¹⁸⁶ U.S. CONST. amend. I. "Congress shall make no law...abridging the freedom of speech, or of the press...." *Id.*

¹⁸⁷ See, e.g., *Schempp*, 374 U.S. 203 (Bible-reading in public school); *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer in public school).

¹⁸⁸ See e.g., *Torcaso v. Watkins*, 367 U.S. 488 (1961) (taking of oath declaring belief in God required for public office unconstitutional).

By and large the federal courts have recognized that a church separated from the state need not be a silent church.¹⁸⁹ So long as expression by religious people and organizations is protected at the same high level as is expression of philosophical, political, economic, or artistic content,¹⁹⁰ there need be no fear for the first amendment rights of churches and ecclesiastics of all persuasions to believe,¹⁹¹ speak,¹⁹² publish,¹⁹³ petition and

¹⁸⁹ See *Widmar*, 454 U.S. 263 (state university must make facilities on campus available to student groups on equal basis, including all religious organizations); *Bender v. Williamsport Area Sch. Dist.*, 106 S. Ct. 1326, 1336, 1337-38 (1986) (Burger, C.J., dissenting), *Id.* at 1338-39 (Powell, J., dissenting) (principle established in *Widmar* applies in public secondary schools as well). The idea that speech of religious content must be given the same protection as other speech is codified in Congress' Equal Access Act, 24 U.S.C. §§ 4071-74 (Supp. 1985).

¹⁹⁰ *McDaniel*, 435 U.S. 618, 640-42 (Brennan, J., concurring). See also Hehir, *Religious Transnationalism: Personal Conscience, Civic Loyalty, and Political Legitimation*, *CHURCH & STATE ABROAD*, June 1986, at 2, 3:

There is no indication in history, law or policy that the First Amendment was meant to silence the voice of organized religion. Although the First Amendment assures the secular character of the state, a secular state is not synonymous with a secularist society, which in principle would seek to exclude religious insight, values, and activity in the public life of society. A secular state leaves the religious institutions free to engage the debate about power and legitimacy.

¹⁹¹ For cases concerning religious liberty as an aspect of the implied first amendment guarantee of freedom of belief or thought, see *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (sustaining claim by Jehovah's Witness that state requirement that motor vehicle license plate bear the motto "Live Free or Die" violates freedom of thought guarantee which includes the "right to refrain from speaking at all"); *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (religious test for public office invades "freedom of belief and religion"); *Ballard*, 322 U.S. at 86 ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men."); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (compulsory flag salute and pledge of allegiance invades the "sphere of intellect and spirit").

¹⁹² For cases concerning religious liberty as an aspect of the rights protected by the free speech clause, see *Widmar*, 454 U.S. 263 (state university cannot, consistent with the "rights of speech and association," deny student religious groups access to facilities provided to all other recognized student groups); *Kunz v. New York*, 340 U.S. 290, 295 (1951) (reversing conviction of Baptist minister, who gave inflammatory sermon on public street after being denied permit to hold a meeting, as a prior restraint on "the right to speak"); *Saia v. New York*, 334 U.S. 558, 559-60 (1948) (holding unconstitutional as a "previous restraint on the right of free speech" an ordinance used to deny use of loud-speaker in park by Jehovah's Witness); *Cantwell*, 310 U.S. 296, 307 (1940) (reversing conviction of Jehovah's Witness for breach of the peace and failure to have permit to solicit money and sell literature as contrary to free exercise of religion and "freedom to communicate information of opinion"); cf. *Heffron*, 452 U.S. 640 (upholding restrictions of the selling, exhibiting and distribution of printed material at state fair as reasonable time, place and manner restrictions on the right to communicate); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (conviction of Jehovah's Witness upheld for violating law against "fighting words" which did not reasonably impinge upon the "privilege of free speech").

¹⁹³ For cases concerning religious liberty as an aspect of the rights protected by the free press clause, see *Marsh v. Alabama*, 326 U.S. 501, 505 (1946) (trespass conviction of Jehovah's Witness for distribution of literature in company-owned town reversed because of "freedom of press and religion"); *Tucker v. Texas*, 326 U.S. 517, 520 (1946) (consistent with "freedom of press and religion," state cannot punish Jehovah's Witness engaged in distribution of literature in village owned by United

assemble¹⁹⁴ relative to matters of faith. Although the Supreme Court has not had occasion to decide upon an instance where a church or cleric was sued for defamation, the Court has spoken with clarion voice concerning the lengths to which religious liberty of churches is inextricably tied to their freedom to give voice to the temporal implications of their creed, even when offensive to many. Thus, in *Fowler v. Rhode Island*¹⁹⁵ the Court, reversing a criminal conviction of a pastor for speaking in a public park without a permit, said:

[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. Sermons are as much a part of a religious service as prayers. They cover a wide range and have as great a diversity as the Bible or other Holy Book from which they commonly take their texts. To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.¹⁹⁶

States); *Follett v. McCormick*, 321 U.S. 573, 576 (1944) (license tax on sales of literature imposed on resident minister selling religious books contrary to the "freedom of religion"); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (striking down license fee required by solicitation ordinance when applied to Jehovah's Witness selling religious literature door-to-door as contrary to the "[f]reedom of press, freedom of speech, freedom of religion"); *Martin v. Struthers*, 319 U.S. 141, 149 (1943) (reversing conviction of Jehovah's Witness who violated a city ordinance concerning door-to-door solicitation and distribution of handbills as invalid denial of "freedom of speech and press"); *Largent v. Texas*, 318 U.S. 418, 422 (1943) (reversing conviction of Jehovah's Witness under ordinance forbidding distribution of religious publications without permit as abridging "freedom of religion, of the press and of speech"); *Jamison v. Texas*, 318 U.S. 413, 414 (1943) (ordinance restricting distribution on city street of handbills bearing religious message as restraint on "freedom of press and religion"); *Schneider v. State*, 308 U.S. 147, 164 (1939) (conviction of Jehovah's Witness for canvassing without a permit as abridging "freedom of speech and press"); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938) (municipal ordinance prohibiting distribution of handbills without permit was restraint on "freedom of press" of Jehovah's Witness).

¹⁹⁴ For cases concerning religious liberty as an aspect of the rights protected by the freedom of assembly clause, see *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (discriminatory denial of permit to Jehovah's Witness to hold services in public park is preferring one religious group over others); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (discriminatory denial of permit to Jehovah's Witnesses to use city park for public gathering denied "equal protection of the laws, in the exercise of . . . freedoms of speech and religion"). Cf. *Poulos v. New Hampshire*, 345 U.S. 395 (1953) (sustaining conviction of Jehovah's Witness for conducting a religious meeting in park without a license; petitioner had failed to pursue remedy through local court action); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (upholding conviction of group of Jehovah's Witnesses who paraded without required permit because law was found to be precisely drawn time, place and manner regulation fairly enforced).

¹⁹⁵ *Fowler*, 345 U.S. 67.

¹⁹⁶ *Id.* at 70. See also *Cantwell*, 310 U.S. 296 (reversing criminal conviction of itinerant evangelist for breach of the peace):

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to

Logically, when a church or religious officer is sued for defamation or other speech-related tort, the same first amendment concerns apply that cause our law to disfavor such claims.¹⁹⁷ Thus, the injured party who is a public figure will have to show actual malice with clear and convincing clarity.¹⁹⁸ Where truth is alleged as a defense, the plaintiff must carry the burden of proving falsity.¹⁹⁹ By virtue of the freedom of assembly and of speech, economic boycotts organized by religious leaders receive significant constitutional protection from business-related torts as well.²⁰⁰

III. THE CHURCHES' VIEWS

As noted above,²⁰¹ a second approach to the study of the interaction between church and state entails viewing this relationship from a theological perspective. Every aspect of reality, from metaphysics and epistemology to law and social relations, can be analyzed in terms of presuppositions that are fundamentally religious. Whether based upon reason or revelation, or some mixture of the two, entire theological structures and systems of thought and practice can be formulated to explain why things appear as they do, how they got that way, and how they should be ordered. Of course, the various paradigms will be more or less internally consistent depending upon the degree to which they conform to their underlying presuppositions.

To a certain extent, every human being operates in terms of some understanding of ultimate reality, whether explicitly articulated as religious belief or merely held as a philosophy. Thus Corliss Lamont, for example, admits, albeit somewhat grudgingly, that Humanism, the philosophy to which he adheres, can legitimately be viewed as a religion.²⁰² Because one's views of ethics and morality are generally derived from metaphysics and epistemology, the line of demarcation between sacred and secular is not always readily discernible.

This does not mean, however, that the civil courts should become the handmaidens of a particular ecclesiastical body, representing one theological perspective. Nor, on the other hand, should the courts treat any particular moral philosophy as if it were *ipse dixit* binding on them. Rather, when it comes to resolving disputes

vilification of men who have been, or are, prominent in church and state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuse, those liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Id. at 310.

¹⁹⁷ *McDaniel*, 435 U.S. at 640 (Brennan, J., concurring).

¹⁹⁸ See *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁹⁹ See *Philadelphia Newspaper, Inc. v. Hepps*, 106 S. Ct. 1558 (1986).

²⁰⁰ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

²⁰¹ See *supra* note 29 and accompanying text.

²⁰² C. LAMONT, *THE PHILOSOPHY OF HUMANISM* 144 (1982).

which touch and concern religious belief and practice, courts should zealously safeguard the boundaries erected by the first amendment. Indeed, even democratic pluralism, if uncritically adopted by the courts, could theoretically be used to suppress religious movements or break up churches which attract large numbers of adherents.²⁰³ The express language of the first amendment, and the necessary implications of church-state separation, stand squarely in the way of attempts either by the state to regulate ecclesiastical bodies or by churches to employ the machinery of the state to promote their own parochial goals.

The purpose of this part of the article, then, is to specially equip jurists in the difficult task of discerning that sometimes elusive boundary between church and state. This requires information, both historical and theological, unknown to most lawyers. That this part proceeds from the church's perspective should not be cause for alarm. The very notion of religious liberty means that courts must necessarily examine the setting in which certain disputes arise in order to establish jurisdiction and prevent one sphere from dominating the other. Setting forth the church's view as to its own nature and mission simply helps those charged with the task to see the issues more clearly and to maintain the boundaries more effectively. Further, limiting the following discussion to Christianity must not be construed as a denigration of other faiths. Christianity simply claims the greatest number of adherents in the United States. In order to adequately protect first amendment rights, similar studies should be done for Judaism, Islam, and others.

The first section presents the history of confession and discipline. One purpose is to note that many modern practices, particularly in the area of ecclesiastical discipline, are of ancient origin. From its earliest days, the Christian church has seen fit to protect its integrity and encourage its adherents to personal reformation through the exercise of some form of institutional discipline. In fact, discipline is properly viewed as encompassing the teaching, counseling, and confessional functions as well as the punishment of transgressors. To confine one's understanding of church discipline to the punishment of sinners would be to misinterpret the nature and mission of the church as it has historically understood itself.

Another purpose of this historical overview is to illustrate that ecclesiastical practices, once adopted, are not thereby "set in stone." There are always modifications and developments as certain aspects are found not to work in practice, or as subsequent practitioners attempt to correct what they believe are erroneous precepts in earlier theories. History has witnessed serious schisms, indeed the establishment of entire denominations, based upon someone's attempt to restore a proper understanding of truth and practice.

²⁰³ It is no longer unthinkable that a great number of formerly autonomous ecclesiastical bodies could reunite under one organizational structure. Numerous discussions have already taken place among Lutherans, Episcopalians, and the Roman Catholic Church.

The second section sets forth current standards and practices of church discipline as employed by representative denominations. There are bound to be departures from these enunciated standards as circumstances require. Nevertheless, the various official pronouncements do provide those operating in the civil sphere with useful guidelines for navigating through unfamiliar territory.

A. *The History of Church Discipline and Confession*

1. Early Centuries

The earliest accounts of the institution of the church are found in the Bible itself. The *Book of Acts*, for example, offers a glimpse of the work of the apostles as they began to evangelize after the crucifixion of Jesus. Schaff fixes the date of the Council of Jerusalem mentioned in *Acts* 15 at A.D. 50.²⁰⁴ Other letters and pastoral epistles—designed to give encouragement under persecution,²⁰⁵ offer instruction on church doctrine, governance, and discipline,²⁰⁶ and point to the destiny of the church²⁰⁷—were probably written prior to the destruction of Jerusalem in A.D. 70.²⁰⁸ These writings therefore provide the foundation for subsequent developments in church polity and practice.

Several passages bear directly upon church discipline and confession. Of first importance are the teachings to the disciples in the gospels. *Matthew* reads:

And I tell you that you are Peter, and on this rock I will build my church, and the gates of Hades will not overcome it. I will give you the keys of the kingdom of heaven; whatever you bind on earth will be bound in heaven, and whatever you loose on earth will be loosed in heaven.²⁰⁹

“Binding” in this passage was understood to refer to retaining sins, while “loosing” refers to liberation from sins. Traditionally, the church has interpreted this to require strict standards of admission and discipline.²¹⁰ Another passage cited by the church in support of its authority and responsibility in discipline members appears in *Matthew* 18, an example of procedural guidelines for dealing with errant members:

If your brother sins against you, go and show him his fault, just between the two of you. If he listens to you, you have won your brother over. But if he will not listen, take one or two others along, so that “every matter may be established by the testimony of two or three witnesses.” If he refuses to listen to them, tell

²⁰⁴ 1 P. SCHAFF, HISTORY OF THE CHRISTIAN CHURCH 136 (1910).

²⁰⁵ Cf. *Hebrews*; *James*.

²⁰⁶ Cf. *Romans*; *1 & 2 Corinthians*; *1 & 2 Timothy*; *Titus*; *Jude*.

²⁰⁷ Cf. *Revelations*.

²⁰⁸ D. CHILTON, PARADISE RESTORED 159 (1985).

²⁰⁹ *Matthew* 16:18-19. All biblical passages are taken from the New International Version.

²¹⁰ N. MARSHALL, THE PENITENTIAL DISCIPLINE OF THE PRIMITIVE CHURCH 17 (1844). The Roman Catholic Church derives its view of the papacy from this passage. See *infra* note 366 and accompanying text.

it to the church; and if he refuses to listen even to the church, treat him as you would a pagan or a tax collector.²¹¹

Finally, in *John* 20, Jesus symbolically breathes on the disciples and says, "If you forgive anyone his sins, they are forgiven; if you do not forgive them, they are not forgiven."²¹² Once again, the church has viewed this passage as granting authority by "express charter" to implement a system of forgiveness and excommunication.²¹³ That the church considers this to be of divine institution makes the matter all the more serious and imperative. Thus, in spite of differences in application, all denominations today provide for some method of church discipline.

When the apostles began to plant churches in regions far removed from Jerusalem they understandably encountered a wide variety of belief systems and practices. In Corinth, for example, the Apostle Paul faced opposition in the synagogue, where he always began his preaching, and turned his attention to anyone who would listen.²¹⁴ Professor William Lane has referred to Corinth at that time as "a pagan center known for the extravagance of its pleasures and vice."²¹⁵ Apparently the church at Corinth had tolerated a practice offensive even by Corinthian standards. By his authority as an apostle, Paul ordered the church to cast a man guilty of incestuous relations with his stepmother out of the assembly.²¹⁶ Moreover, all who claimed fellowship as a church member, yet who were in reality "sexually immoral or greedy, an idolater or a slanderer, a drunkard or a swindler," were to be similarly expelled and denied social intercourse with members in good standing.²¹⁷ Evidently the expulsion served to cause the offender to reform, for there is a reference in a subsequent letter to the church at Corinth urging them to restore the one who showed appropriate sorrow and not to be overly severe.²¹⁸

At this juncture it is helpful to ask the broader question concerning why the church thought discipline in its various forms was necessary to begin with. What did the apostles understand to be the nature and mission of the church? Again a passage in the gospels provided a partial answer. *Matthew* 28 reads:

All authority in heaven and on earth has been given to me [Jesus]. Therefore go and make disciples of all nations, baptizing them in the name of the Father and

²¹¹ *Matthew* 18:15-17. Various denominations apply this procedure somewhat differently depending upon their ecclesiastical polity. This will become clear in the subsections on current standards and practices. See *infra* notes 365-472.

²¹² *John* 20:22-23.

²¹³ N. MARSHALL, *supra* note 210, at 10.

²¹⁴ *Acts* 18:1-5.

²¹⁵ G. BARKER, W. LANE & J. MICHAELS, *THE NEW TESTAMENT SPEAKS* 163 (1969). Lane believes Paul first visited Corinth about A.D. 50.

²¹⁶ *1 Corinthians* 5:3-5. Paul refers to the excommunication process as "hand[ing] this man over to Satan, so that the sinful nature may be destroyed and his spirit saved on the day of the Lord." *Id.* at 5:5.

²¹⁷ *Id.* at 5:9-11.

²¹⁸ *2 Corinthians* 2:5-11.

of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you. And surely I will be with you always, to the very end of the age.²¹⁹

This passage the church understood as setting forth, first, the lordship of Jesus over all reality, and second, the subordinate, delegated authority of the church to bring the whole world into ethical conformity with the teachings of scripture.²²⁰ The apostles took this very seriously as is evident from repeated references to the necessity of reflecting divine holiness.²²¹ In fact, they viewed the church as consisting of those called by God through the preaching of the gospel to conform to the ethical character of Jesus.²²² Therefore, the ministry of the church was seen as human participation in the reconciliation between God and man made necessary as a result of sin. The New Testament documents, then, reflected the apostles' belief in the fulfillment of the covenant God established with his people in the Old Testament.²²³ Thus, the church believed that for it to neglect its responsibilities, individually and corporately, would bring disastrous consequences.²²⁴

From this biblical foundation one can now trace developments of these doctrines in the early church. The apostles often included salutations to important co-workers in local churches at the end of their epistles. Some of these workers evidently rose to positions of prominence. Thus tradition holds that Clement, mentioned in *Phillipians* 4:13, eventually became Bishop of Rome. His letter to the Corinthian church, written about A.D. 95,²²⁵ was designed to put an end to dissension and insubordination in that congregation.²²⁶ After rehearsing the history of redemption, Clement said to the troublemakers, "[y]e therefore that laid the foundation of sedition, submit yourselves unto the presbyters and receive chastisement unto repentance, bending the knees of your heart, learn to submit your-

²¹⁹ *Matthew* 28:18-20.

²²⁰ This was not taken to mean that the church was commissioned to dominate all other spheres of human activity, nor that the church had automatic jurisdiction over everyone. Rather, the goal was to win converts through preaching and then to train them for works of godliness. Those outside the church would, it was thought, be dealt with by God in his own time. *1 Corinthians* 5:12-13. Cf. *Ephesians* 4:21-24; *Titus* 3:8.

²²¹ Cf. *1 Peter* 1:15; *Colossians* 3:12; *Ephesians* 5:8-10.

²²² Thus Paul refers to his Roman audience as those "who are loved by God and called to be saints." *Romans* 1:7. He develops this point in detail in the letter to the Ephesians, noting that those who believe the gospel had been destined to be as sons of God. *Ephesians* 1:5. Cf. *1 Peter* 1:1; *2 John* 1 and *Jude* 1. This has important implications for church membership. See *infra* note 261.

²²³ See *2 Corinthians* 6:16-18, where Paul refers to Christians as "the temple of the living God" and reminds his followers of the covenantal promises of the Old Testament.

²²⁴ Cf. *Deuteronomy* 28; *Hebrews* 12:28-29.

²²⁵ N. MARSHALL, *supra* note 210, at 20-21; J. B. LIGHTFOOT, *THE APOSTOLIC FATHERS* 11-41 (1956).

²²⁶ J. B. LIGHTFOOT, *supra* note 225, at 33. "It is shameful, dearly beloved, yes, utterly shameful and unworthy of your conduct in Christ, that it should be reported that the very steadfast ancient Church of the Corinthians, for the sake of one or two persons, maketh sedition against its presbyters."

selves, laying aside the arrogant and proud stubbornness of your tongue.”²²⁷ The importance of this command lies in its recognition of the authority of presbyters²²⁸ in the church. Although he did not proceed to pronounce ecclesiastical censure, clearly Clement envisioned that the officers of the church have the authority to do so if other attempts at reconciliation fail. His warning against undue self-aggrandizement in the church is an early example of the type of exhortation prevalent much later as pastors and bishops urged their people to make confession after committing serious offenses.²²⁹

Another important work from the same time period is *The Shepherd of Hermas*.²³⁰ In this somewhat mystical piece, Hermas urged pastors in familial terms to look carefully after the spiritual condition of church members.

. . . [T]ake courage, and strengthen the family. For as the smithy hammering his work conquers the task which he wills, so also doth righteous discourse repeated daily conquer all evils. Cease not therefore to reprove thy children; for I know that if they shall repent with all their heart, they shall be written in the books of life with the saints.²³¹

Cast in the form of visions, mandates, and parables, *The Shepherd of Hermas* emphasized the need for purity and holiness to avoid eternal judgment. Indeed, there is a trace here of the notion that baptism represents cleansing from sin and that sins committed subsequent to baptism can have condemnatory consequences.²³² To avoid extreme harshness the author provided for a gradation of

²²⁷ *Id.* at 37.

²²⁸ The term “presbyter” is apparently used interchangeably with the term “bishop” in the Bible. G. BARKER, W. LANE & J. MICHAELS, *supra* note 215, at 243. Important differences in ecclesiology arose partly out of emphasis upon one of the terms.

²²⁹ Watkins thus quotes St. Boniface in the mid-Eighth Century: “And it is better to confess our sins to one man than to be made manifest in that tremendous judgment before the three families of heaven and earth and hell, and to be confounded for our sins, not for amendment, but for punishment perpetual. . . .” 2 O. D. WATKINS, *A HISTORY OF PENANCE* 660 (1962). It should now be clear that the church has viewed its mission in redemptive terms, seeking to help people avoid eternal condemnation by continual exhortations to repentance and godly living. Censure and excommunication are merely the next procedural steps for dealing with recalcitrant members. N. MARSHALL, *supra* note 210, at 61, points out three major reasons for formal disciplinary procedures: (1) The honour of the church, (2) as an example to others, and (3) for the good of the delinquent.

²³⁰ Ancient tradition attributes this work to the Hermas mentioned by Paul in *Romans* 16:14, although more modern scholarship raises doubts. N. MARSHALL, *supra* note 210 at 22; J. B. LIGHTFOOT, *supra* note 225, at 161-62. Cf. 1 O. D. Watkins, *supra* note 229, at 50-52.

²³¹ J. B. LIGHTFOOT, *supra* note 225, at 167.

²³² If then, when ye hear [the commandments and parables], ye keep them and walk in them, and do them with a pure heart, ye shall receive from the Lord all things that he promised you; but if, when you hear them, ye do not repent, but still add to your sins, ye shall receive from the Lord the opposite.

Id. at 181.

Most tellingly, the Shepherd, figuratively representing Jesus, tells Hermas, “But I say unto you...if after this great and holy calling anyone, being tempted to the devil, shall commit sin, he hath only one [opportunity of] repentance. But if he sin off-hand and repent, repentance is unprofitable for such a man....” *Id.* at 185.

sins. Some placed the offender beyond repentance while others required immediate repentance for salvation.²³³ A striking vision of stones being placed in the construction of a tower represents the work of the church in fulfilling its earthly tasks by acts of admission and rejection.²³⁴

From this point forward one can trace the development of a system of public penance and absolution. The emphasis on purity evident in *The Sheperd of Hermas* naturally required formal procedures for purposes of discipline and consolation. From the church's standpoint, it was serious work to admit and reject people from the kingdom of heaven. Divine standards had to be upheld regardless of how they were understood. Perhaps the central function of the church was to "shepherd" the faithful through their obligations before God. From the penitent's perspective, a strict emphasis upon purity could raise serious doubts about one's salvation. In such a case it was only logical to look to the clergy for assurance.²³⁵

By the time of Tertullian,²³⁶ public penance was a well known institution.²³⁷ Those whose lifestyle did not reflect their profession of faith were prohibited from participating in the sacrament of communion. Moreover, there could be no doubt as to who had committed serious offenses. Penitents were required to undergo a formal ritual called *exomologesis*²³⁸ before being ordered from the church at the time for communion. Perhaps the best early description of *exomologesis* appeared in Tertullian's *De Poenitentia*, written towards the end of the Second

²³³ *Id.* at 234-39. This gradation marks the beginning of a distinction between mortal and venial sins. Even so, salvation did not come easily:

...[W]ell, thinkest thou that the sins of those who repent are forgiven forthwith? Certainly not; but the person who repents must torture his own soul, and must be thoroughly humble in his every action, and be afflicted with all the divers kinds of affliction; and if he endure the afflictions which came upon him, assuredly he who created all things and endowed them with power will be moved with compassion and will bestow some remedy.

²³⁴ *Id.* at 239-71. 1 O. D. WATKINS, *supra* note 229, at 70. *The Sheperd of Hermas* was so popular that some considered it to be canonical. J. B. Lightfoot, *supra* note 225, at 161. In *Matthew* 16:19, the role of building the Kingdom of God through admission and rejection is referred to as the "power of the keys."

²³⁵ As the church expanded throughout Europe and northern Africa there came to be a secular dimension as well. Civil rulers found in the church a ready ally in maintaining social control. According to Lea, "a passage in St. Augustin would seem to show that the secular courts sometimes would release convicted criminals at the intercession of bishops, on the understanding that they should be subjected to penance." 1 H. LEA, *A HISTORY OF AURICULAR CONFESSION AND INDULGENCES IN THE LATIN CHURCH* 18 (1968).

²³⁶ Born in Carthage between A.D. 150 and 160, Tertullian converted to Christianity around A.D. 192. 1 O. D. WATKINS, *supra* note 229, at 113. He was an early expositor of the Catholic faith.

²³⁷ 1 H. LEA, *supra* note 235, at 21, argues that private penance did not appear until approximately the middle of the Fifth Century.

²³⁸ The term was translated in Latin as *confessio* and means confession. Quoting Tertullian, Watkins points out that *exomologesis* "is understood besides the confession in words to imply also the accompanying 'description for man's prostration and humiliation.'" 1 O. D. WATKINS, *supra* note 229, at 114-15. Confession of sin, most likely to a priest, preceded the public ritual. J. GUNSTONE, *THE LITURGY OF Penance* 28 (1966).

Century. Although it is a lengthy account, it is so clear as to be of great value in understanding what the church was trying to accomplish.

This act. . . is *Exomologesis*, by which we confess our sins to the Lord, not because He knoweth it not, but inasmuch as by confession satisfaction is ordered, from confession repentance springeth, by repentance God is appeased. Wherefore exomologesis is a discipline for the abasement and humiliation of man, enjoining such conversation as inviteth mercy; it directeth also even the matter of dress and food, that [the penitent] should abide in sackcloth and ashes, should disfigure his body by filthy attire, should cast down his spirit with mourning, should exchange the sins which he has committed for severe treatment: for the rest, to use simple things for meat and drink, to wit, not for the belly's, but for the soul's sake: for the most part also to cherish prayer by fasts, to groan, to weep, and to moan day and night unto the Lord his God; to throw himself upon the ground before the presbyters, and to fall on his knees before the beloved of God; to enjoin all the brethren to bear the message of his prayer for mercy. All these things doeth exomologesis that it may commend repentance; that by fearing danger it may honour God; that itself pronouncing judgment on the sinner, it may act instead of God's wrath, and that, by means of temporal affliction, it may. . . discharge the eternal penalties. When therefore it casteth down a man, it rather raiseth him up: when it maketh him filthy, it rendereth him the cleaner: when it condemneth, it absolveth. In the measure in which thou sparest not thyself, in the same, be assured, will God spare thee.²³⁹

The purpose of this ritual was therefore to demonstrate to the offender, symbolically, the seriousness of his or her transgression before God and the inward disposition required for forgiveness. It also provided an outlet for troubled penitents to bemoan their guilt and to request the intercession of the faithful on their behalf. As the church restored penitents to the fellowship via the laying on of hands by the bishop, sinners were to understand that they had been forgiven by God.²⁴⁰ The public nature of penance served to remind everyone that the church had before it a very serious, divinely-ordained mission to accomplish, one in which every member was called to participate.

There were some offenses which Tertullian and other early church fathers considered irremissible in this life: apostasy, sexual impurity, and bloodshed.²⁴¹

²³⁹ I O. D. WATKINS, *supra* note 229, at 115-16.

²⁴⁰ In other words, the church merely pronounced God's absolution after the fact. Much later, penance rose to sacramental status whereby the mere performance of the ritual was seen to confer grace (*ex opere operato*).

²⁴¹ I O. D. WATKINS, *supra* note 229, at 105. This did not mean that such offenders were without hope of salvation, but only that the church was thought to lack power and authority to remit these most serious of sins. After the church officially adopted the practice of admitting serious offenders to penance once during their lifetime, this notion persisted with respect to repeat offenders. Thus, St. Augustin said:

Therefore, though it be wise and wholesome appointment of the Church to allow but once the benefits of solemn [*i.e.*, public] penance, lest it should bring contempt upon the medicine, and so should render it the less beneficial; yet who will venture to say to God, Why dost

In his later years Tertullian strongly decried the tendency of the church at Rome to treat sins of impurity leniently. He eventually adopted a very strict position with respect to penance and severely castigated Pope Callistus in A.D. 220 for admitting fornicators and adulterers to penance, reconciliation, and communion.²⁴² After Callistus' pronouncement, the official position of the church was that those who had committed mortal sin after baptism could be admitted to penance once during their lifetime. Further transgression left offenders to the mercy of God in the final judgment.

Not everyone was willing to present themselves for public penance and absolution, and therefore not everyone confessed their transgressions. In such cases the episcopal tribunals were empowered to receive charges and render decisions. Lea's description is instructive:

Their sessions were public, they heard accusations, they examined witnesses, they convicted or acquitted the accused according to the evidence, and they apportioned the punishment or penance to be endured before he should be admitted to reconciliation. If he came forward voluntarily and confessed before the congregation, this evidence of repentance gained for him a mitigation of the penalty.²⁴³

Furthermore, bishops had a duty to investigate charges and rumors of sin prior to instituting formal proceedings, and to make certain that charges were corroborated by "at least three witnesses of good reputation and not inimical to the accused."²⁴⁴

As the church grew and expanded, however, it became virtually impossible to reach a great number of transgressors. By the end of the Second Century many sought to avoid public penance altogether, either for reasons of shame or for fear of repeating offenses. For the former, Tertullian had only biting sarcasm:

I presume, however, that men for the most part either shun, or put off from day to day, this work, as an open exposure of themselves, being more mindful of their shame than of their health; like those who, having contracted some malady in the more hidden parts of the body, avoid making their physicians privy to it, and so perish with their bashfulness. It is forsooth intolerable to modesty to make satisfaction unto their offended Lord! to be restored to the health which they have wasted away! Brave art thou in thy modesty truly! bearing an open front in sinning, and a bashful one in praying for pardon.²⁴⁵

thou yet spare the man who, after having been once admitted to pardon, involves himself afresh in the guilt of sin?

N. MARSHALL, *supra* note 210, at 82. The church obviously did not claim perfection.

²⁴² 1 O. D. WATKINS, *supra* note at 229, 118-29. He became a Montanist, a member of a strict separatist sect which demanded withdrawal from all who failed to uphold the most rigid standards of purity. Montanism in its various forms greatly influenced the development of penance in the church, although it never rose to preeminence. The most direct influence of Montanism for purposes of this paper was in lengthening the periods of penance. N. MARSHALL, *supra* note 210, at 50.

²⁴³ 1 H. LEA, *supra* note 235, at 12.

²⁴⁴ *Id.* at 12-13.

²⁴⁵ 1 O. D. WATKINS, *supra* note 229, at 117. This passage is from *De Poenitentia*, written before Tertullian became a Montanist.

He then asked, rhetorically, "[i]s it better to be damned in secret than absolved openly?"²⁴⁶ Surely *exomologesis* was the better option: "If thou art drawing back from *exomologesis*, consider in thine heart that hell-fire which *exomologesis* shall quench for thee, and first imagine to thyself the greatness of the punishment, that thou mayest not doubt concerning the adoption of the remedy."²⁴⁷

There soon developed in some churches, particularly in the East, the delineation of penitents into distinct "stations." Thus, Gregory Thaumaturgus, Bishop of Neo-Caesarea in Pontus from A.D. 233 to 270, set forth five stations through which penitents must ordinarily pass before they were reconciled to the church.²⁴⁸ Again, there could be no doubt as to who the serious offenders were. Watkins outlines the five stations as follows:

1. *The Mourners*, who are in truth outsiders seeking recognition as penitents, came to be spoken of as the lowest grade of penitents. Their place is outside the outer portal of the church.
2. *The Hearers*, who stand in the narthex, outside the door of the nave, during the *missa catechumenorum* only.
3. *The Fallers*, who fall in self-abasement when admitted among the Christian faithful in the nave. These, too, leave after the *missa catechumenorum*.
4. *The Bystanders*, who remain throughout the Liturgy, but do not communicate.
5. *The Faithful*, among whom the restored penitent takes his place for communion.²⁴⁹

It appears that the precise nature of the offense may have been revealed to the congregation, although local practices varied. In any event, Pope Leo's letter to the bishops in A.D. 459 demanded an end of "public recitation of the nature of particular sins."²⁵⁰

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 117-18. The fear of repeated sin must have been very great as many began to postpone penance until their death-bed. This practice was most significant in the rise of private confession and sacramental penance, largely because the church could offer no assurance as to the efficacy of death-bed penance. 1 H. LEA, *supra* note 235, at 32.

²⁴⁸ See his Canonical Epistle in 6 THE ANTE-NICENE FATHERS 18-20 (Alexander and Roberts eds. 1951).

²⁴⁹ 1 O.D. WATKINS, *supra* note 229, at 246. Worship in the early church was taken very seriously. Catechumens, those who were being instructed in the faith prior to receiving baptism, were not allowed to stay for prayer and communion. Baptism was thus the means of entering into the fellowship of the church. Those who had not been baptized, or who, by their actions, denied their baptism (*i.e.*, penitents) were required to go through the formal procedures before admission or readmission.

²⁵⁰ *Id.* at 423. In those churches which employed a clerical penitentiary to hear confessions of secret sins, it is doubtful that the precise nature of the offense was revealed. When a penitentiary in

As noted above,²⁵¹ the church believed that apostasy, impurity, and bloodshed constituted the most serious offenses. After Callistus established a more lenient policy with respect to sexual violations, the next great controversy arose over the status of those who lapsed under the Decian persecution and petitioned for readmission once the brutality subsided. Cyprian, elected Bishop of Carthage in A.D. 248, argued that the church should withhold reconciliation from all who lapsed, except those on their death-bed who (1) held a certificate from someone who had been victimized by the Romans, (2) had made exomologesis, and (3) who had been reconciled by the laying on of hands.²⁵² Two councils held at Carthage, A.D. 251 and A.D. 252, settled the matter. Henceforth, all who lapsed that were truly penitent were admitted once to penance, reconciliation, and absolution.²⁵³

It is helpful at this point to examine more closely the behavioral problems the church sought to correct. In his Canonical Epistle, written between A.D. 258 and 262, Gregory Thaumaturgus outlined several offenses deserving excommunication: covetousness, fornication, acting like one's captors when kidnapped by barbarians, and keeping property belonging to others which had been inadvertently left behind by barbarian invaders.²⁵⁴ The *Didascalia Apostolorum*, written sometime during the Third Century, was more comprehensive. Bishops were to take charge of the process of binding and loosing. Although there was "repeated and earnest insistence in the policy of compassion to the penitent sinner," the standards were strict and only one penance was granted.²⁵⁵ Among other commands, men were advised to "not nourish the hair of thy head, but do thou shear it off; and thou shalt not comb and adorn it, nor anoint it, lest thou bring upon thee such women as ensnare, or are ensnared, by lust."²⁵⁶ Similarly, women were warned to "not adorn thyself that thou mayest please other men; and thou shalt not be plaited with the tresses of harlotry, nor put on the dress of harlotry. . . ."²⁵⁷ Parents were commanded to "teach [their] children crafts that are agreeable and befitting to religion, lest through idleness they give themselves to wantonness. For if they are not corrected by their parents, they will do these things that are evil, like the heathen."²⁵⁸ Each person was required to "keep himself from vain speech and from words of levity and profanity."²⁵⁹ Bishops, those charged with teaching and enforcing the standards, were instructed by analogy to the medical profession:

A.D. 397 made public the fact of confessed sin between a woman and a deacon of the church, Nectarius, the Bishop of Constantinople, abolished the office. N. MARSHALL, *supra* note 210, at 199; 1 O. D. WATKINS, *supra* note 229, at 349-52.

²⁵¹ See *supra* note 241 and accompanying text.

²⁵² 1 O. D. Watkins, *supra* note 229, at 185.

²⁵³ *Id.* at 207. If a lapsed person confessed Christ in the face of a second wave of persecution and was exiled he was also readmitted to the fellowship of the faithful.

²⁵⁴ 6 THE ANTE-NICENE FATHERS, *supra* note 248, at 18-20.

²⁵⁵ 1 O. D. WATKINS, *supra* note 229 at 249-53.

²⁵⁶ DIDASCALIA APOSTOLORUM 10. (Clarendon Press ed. 1969). The precise date and authorship of the *Didascalia* is unknown, although it claims apostolic authority.

²⁵⁷ *Id.* at 23.

²⁵⁸ *Id.* at 193.

²⁵⁹ *Id.* at 178.

[A]s a compassionate physician, heal all those who sin; and go about with all skill, and bring healing to bear for the succour of their lives. . . . But if thou see that a man will not repent, but has altogether abandoned himself, then with grief and sorrow cut him off and cast him out of the Church.²⁶⁰

They were also to exhort members to attend worship services and admonish absentees.²⁶¹ Although members were commanded to "be peaceable one with another," the *Didascalia* provided for inquiry and dispute resolution by the bishop, the "son of light and peace," in the event all other attempts at reconciliation failed.²⁶² Finally, to illustrate the fact that local variations in practice existed among the churches, the *Didascalia* described only three categories of people in relation to the Church,²⁶³ whereas the canonical epistle mentioned five.

The canons of the various ecumenical councils²⁶⁴ provide another source of information regarding early church teaching and practice. In A.D. 325, during the reign of Emperor Constantine, the church met in council at Nice to refute Arius' contention that the second person of the Trinity is subordinate to the Father and thus "inferior to the Father both in nature and dignity."²⁶⁵ After formulating the orthodox position on this issue, the Council promulgated numerous canons to resolve practical matters. Certain of these are of interest. Canon VIII referred to Novatian schismatics who subsequently returned to orthodoxy. They were required to:

[P]rofect in writing that they will observe and follow the dogmas of the Catholic and Apostolic Church; in particular that they will communicate with persons who have been twice married, and with those who having lapsed in persecution have had a period [of penance] laid upon them, and a time [of restoration] fixed. . . .²⁶⁶

²⁶⁰ *Id.* at 104-05. Bishops were warned against undue severity:

Do not then use force, and be not violent, and pass not sentence sharply, and be not unmerciful; and deride not the people that is under thy charge, nor hide from them the word of repentance....For he who drives a man out of the Church without mercy, what does he else but cruelly slay and shed blood without pity?

Id. at 64-66.

²⁶¹ *Id.* at 124-29. Marshall points out that "it was then an undisputed maxim, that no man was a Christian who was not in the Church...." N. MARSHALL, *supra* note 210, at 56. It is clear that the church did not consider itself a mere voluntary society. The doctrines of election and predestination precluded a purely voluntary view of the church membership. See *supra* note 222.

²⁶² DIDASCALIA, *supra* note 256, at 112-19.

²⁶³ These were the Excluded, the Penitents, and the Faithful. I O. D. WATKINS, *supra* note 229, at 259.

²⁶⁴ The term "ecumenical" refers to the fact that the councils represented the "whole body of the Christian Church." There is little agreement among the various denominations as to how many of these should be accorded official status. C. BUCK, A THEOLOGICAL DICTIONARY 99 (1831).

²⁶⁵ *Id.* at 24. The Ecumenical Councils were of crucial importance in settling matters of doctrine. They promulgated canons because discipline is the practical application of doctrine.

²⁶⁶ C. BUCK, *supra* note 264, at 19-20. The Novatians were another sect who practiced rigid standards of purity (they called themselves the Cathari, the "pure"), going so far as to deny communion to those whose first spouse had died and who subsequently remarried. According to Buck, "their doctrine was, that the church had it not in its power to receive sinners into its communion, as having no way of remitting sins but by baptism; which once received, could not be repeated." C.

Canon IX ordered presbyters to be deposed if, subsequent to their ordination, they were found to have committed a crime prior to installation.²⁶⁷ Canons XI to XIV indicate that the church had adopted fixed periods of penance: (1) for those who apostatized "without compulsion," if they repented they faced "three years among the hearers, and for seven years they shall communicate with the people in prayers, but without oblation (*i.e.*, the Lord's Supper);"²⁶⁸ (2) returning to military service brought penance of "three years as hearers [and] ten years [as] prostrators;"²⁶⁹ (3) those who recovered after receiving reconciliation on their death-bed were to "remain among those who communicate in prayers only;"²⁷⁰ and (4) repentant lapsed catechumens were to know that "after they had passed three years only as hearers, they shall pray with the catechumens [*i.e.*, for the rest of their life]."²⁷¹ Canons V and XVI concerned laity and clergy who left their own congregations and sought to be admitted to another, either upon excommunication or out of disdain for the local assembly. Such were not to be admitted to another congregation; they were to return to their original fellowship or be excommunicated.²⁷²

In the case of one who returned to military service, penance carried with it certain disabilities. Watkins summarizes the rules as follows: "[n]o penitent may undertake military service. No penitent is to be found at the games of the circus. No penitant may after penance marry. No married penitents may after penance resume the cohabitation of marriage."²⁷³ As always, there was an effort to alleviate the harshness of these disabilities. In A.D. 385, Pope Siricius decreed that offenders should be allowed to remain in church during the celebration of the sacrament but were not allowed to partake until their death-bed.²⁷⁴ Moreover, owing to "the fragility of youth, it was recommended that penance should not be imposed on those of immature age."²⁷⁵ To complicate matters, the consent of the innocent spouse was required before the guilty partner could be admitted to penance.²⁷⁶ By the Ninth Century offenders were offered a choice between public

BUCK, *supra* note 264, at 313. This position would have destroyed the church had it been accepted as official doctrine.

²⁶⁷ THE SEVEN ECUMENICAL COUNCILS 23 (H. Percival ed. 1900).

²⁶⁸ *Id.* at 24 (Canon 11).

²⁶⁹ *Id.* at 27 (Canon 12).

²⁷⁰ *Id.* at 29 (Canon 13).

²⁷¹ *Id.* at 31 (Canon 14).

²⁷² *Id.* at 13, 35. This bears upon modern disciplinary practices. Since the church is not a voluntary, contractual society, churches set their own standards for admission, continuation of fellowship, and excommunication. If churches can look beyond their differences with other denominations, it is not unthinkable that there could be some degree of cross-denominational cooperation in upholding disciplinary decisions. It is common today for someone facing discipline in one church to merely leave and attend another of a different denomination.

²⁷³ 1 O. D. WATKINS, *supra* note 229, at 411-12.

²⁷⁴ 1 H. LEA, *supra* note 235, at 35.

²⁷⁵ *Id.* at 29.

²⁷⁶ *Id.* In spite of moderate leniency on some matters, strict separation of spouses was enforced during and after penance. Thus the Council of Arles, in A.D. 443, "expelled...[both] offender...[and]

penance, with all its disabilities, and life in a monastery.²⁷⁷

Civil rulers were not exempt from penance. One of the most famous early examples of an official submitting to ecclesiastical authority after committing a serious offense was the Emperor Theodosius. In A.D. 390, Theodosius brutally put an end to civil unrest in Thessalonica by summarily executing seven thousand people.²⁷⁸ "When the emperor returned to Milan, and was about to visit the church, Ambrose [Bishop of Milan] went out to meet him, and forbade him to enter the building."²⁷⁹ Eight months later, at Christmas, Theodosius, still denied access to the church, is said to have "shut himself up in his palace, and shed floods of tears":

I weep and sigh when I reflect on the calamity in which I am involved. The church of God is open to servants and to mendicants, and they can freely enter and pray to the Lord. But to me the church is closed, and so are the doors of heaven. I bear in mind the utterance of the Lord, which says expressly, *Whatsoever ye shall bind on earth shall be bound in heaven.*²⁸⁰

In the Ninth Century, Louis le Debonnaire, a son of Charlemagne, agreed to relinquish arms for a period of time in submission to ecclesiastical authority after "undue cruelty in the suppression of the rebellion of his nephew Bernard, King of Italy." Louis "expressed his profound contrition, asked for penance and reconciliation, and duly accepted the sentence rendered by appearing as a public penitent."²⁸¹ Emperor Henry III, in the Eleventh Century, apparently "never put

newly-wedded spouse." *Id.* In addition, no penitent was to eat meat and drink wine if fish and vegetables were at hand.

²⁷⁷ 2 O. D. WATKINS, *supra* note 229, at 716-17. Watkins refers to a letter written in A.D. 794 by "Paulinus, patriarch of Aquileia...to a Lombard named Heistulf, who had killed his wife on suspicion of unfaithfulness." Because the letter reveals something of the worldview of the day, it is instructive to include part of it here.

But if thou desire to do public penance while remaining in thine house or in this world, which, as thou mayest be well assured, is heavier and harder and worse, we give thee exhortation that thou must act as follows. Every day thou livest thou must do penance: thou mayest not drink wine or any strong drink, and thou mayest eat no flesh at any time except at Easter and at Christmas. Do thy penance in bread and water and salt. Persevere continually in fasts, in vigils, in prayers, and in alms. Never presume to wear weapons or to go to law in any place. Thou mayest never marry a wife, or have a concubine, or commit adultery. Thou mayest never presume to wash in the [public ?] bath, or to mix in the convivial assemblies of those who make merry. In the churches thou must place thyself behind the doors and the posts in separation from other Christians, and must commend thyself in supplication to the prayers of those who enter and who pass out. Thou must abstain from the communion of the sacred Body and Blood of Christ all the days of thy life as regarding thyself unworthy: but only on the final day of departure from thy life we concede to thee that thou mayest receive It as a Viaticum, and by way of pardon, if thou art deserving....

Id.

²⁷⁸ 1 O. D. WATKINS, *supra* note 229, at 436.

²⁷⁹ *Id.*

²⁸⁰ *Id.* (emphasis in original). It is not clear how long this state of affairs persisted.

²⁸¹ 2 H. LEA, *supra* note 235, at 74. Charlemagne is said to have found penance "one of the most useful factors in his policy, to be enforced as rigidly as the penalties of the secular courts."

on royal insignia without having first confessed and undergone the discipline in satisfaction of his sins."²⁸² And Henry IV, in his famous confrontation with Pope Gregory VII over lay investiture of bishops, stood barefoot in the middle of winter and "in coarse attire" for three days outside the castle at Canossa in penitential submission.²⁸³

The clergy, on the other hand, were exempt from performing penance. Clerical offenders were to be deposed or excommunicated, but imposition of penance was thought to violate scriptural prohibitions against multiple punishment for the same offense.²⁸⁴ In general, the standards for the clergy were the same as for the laity, although the clergy were expected to set a good example and were therefore to avoid even the appearance of wrongdoing. Thus, Canon III of the Council of Nice forbade "any bishop, presbyter, deacon, or any one of the clergy whatever, to have a *subintroducta* dwelling with him, except only a mother, or sister, or aunt, or such persons only as are beyond all suspicion."²⁸⁵ Clerical marriage was forbidden by Canon I of the Council of Neo-Caesarea, A.D. 315.²⁸⁶ The Canons of Athanasius prohibited priests from acting as a "go-between in the putting asunder of a marriage. If any be found that hath done this, he shall be excluded until that marriage be brought again together."²⁸⁷ Evidently the word had not

Id. at 110. Furthermore, he decreed that "those secretly guilty of capital crimes, who would confess them to the priest and accept penance, should escape other punishment on the testimony of the confessor." 1 H. LEA, *supra* note 235, at 189.

²⁸² 1 H. LEA, *supra* note 235, at 196.

²⁸³ B. TIERNEY, *THE CRISIS OF CHURCH AND STATE, 1050-1300*, 54, 63 (1964). Henry's penitance was evidently short-lived. Several years later he marched on Rome, forcing the Pope to flee, and enthroned a man of his own choosing. Lea points out that penance gradually grew to have more and more temporal consequences:

[I]n 1225, Honorius III issued a decretal pronouncing infamous all concerned in assailing or injuring cardinals; they forfeit any fiefs held of churches; they are declared incapable of bequeathing or inheriting property, of bearing witness and of prosecuting or defending suits; for two generations in the male line their descendants are disabled from holding public office; they are excommunicated *ipso facto*, to be reconciled only on presenting themselves at the principal churches of the vicinage on Sundays and feast days to be scourged on the bare back, after which they are to serve for three years in Palestine....

2 H. LEA, *supra* note 235, at 85.

²⁸⁴ 1 H. LEA, *supra* note 235, at 42. Marshall cites as an example of civil rulers upholding a disciplinary decision:

the famous case of Paulus Samosatenus, who, being convicted of heresy, and various other crimes, by the Bishops assembled in Council at Antioch, was deposed from his see....But he...being unwilling to quit possession of the church and palace, the Bishops addressed the then Emperor Aurelian, who gave command that Paul should resign, as the Bishops of the Christian religion in Italy and Rome should determine upon that affair.

N. MARSHALL, *supra* note 210, at 97-98.

²⁸⁵ *THE SEVEN ECUMENICAL COUNCILS*, *supra* note 267, at 11.

²⁸⁶ *Id.* at 79. Apparently, after a presbyter was excommunicated for a particularly heinous offense, he could be subjected to penance. Thus, Canon I reads in full: "If a presbyter marry, let him be removed from his order; but if he commit fornication or adultery, let him be altogether cast out [i.e., of communion] and put to penance." .

²⁸⁷ *THE CANONS OF ATHANASIOS OF ALEXANDRIA* 35 (W. Reidel & W. Crum eds. 1904).

spread from Neo-Caesarea concerning clerical marriages, for Athanasius' Canon 75 decreed: "If it be found that the son of a priest hath gone to the theatre, the priest shall be put forth a week, because that he hath not trained up his son aright."²⁸⁸ Inter-clergy disputes were to be resolved by the bishop, or by his consent, rather than by secular courts. Those who circumvented this requirement were "subjected to canonical penalties."²⁸⁹ Monks or clergyman who assumed military duty or "any secular dignity" were "anathematized."²⁹⁰ The goal was to keep the offices and functions of the clergy as distinct from the world as possible.

2. Middle Ages

The trend in the Middle Ages was away from public penance. As the church expanded throughout Europe, clergymen were simply unable to introduce public penance among recent converts.²⁹¹ This is not surprising. If those in the great centers of the church were increasingly reluctant to present themselves for *exomologesis*, even after Theodosius' example,²⁹² what could one expect from free-spirited Teutonic tribes? Moreover, Lea argues that:

The size of the dioceses, the insecurity of the roads, and the troubles of those centuries of transition rendered it impossible for the bishops to listen to penitents and for penitents to be confined to episcopal reconciliation. Much of this work necessarily fell into the hands of the parish priests...and a change in practice was inevitable, leading eventually to a change in doctrine.²⁹³

Thus, factors both internal and external to the church contributed to the development of a system of private penance. It was out of this development that the rite of confession arose to a position of great importance in the church.

According to Watkins, the practice of monastic confession under St. Benedict in the Sixth Century, "when extended in the Christian community generally at a later date, revolutionized the methods of Penance."²⁹⁴ However, it had to interact with other practices along the way before its full effects could be realized. For example, confession was ordinarily made to a priest prior to voluntarily un-

²⁸⁸ *Id.* at 48.

²⁸⁹ THE SEVEN ECUMENICAL COUNCILS, *supra* note 267, at 274 (Council of Chalcedon (A.D. 451), Canon IX).

²⁹⁰ *Id.* at 272.

²⁹¹ N. MARSHALL, *supra* note 210, at 95. Marshall refers to "the untamed natures of the Barbarians, whose laws prescribed only pecuniary, non-personal, punishments; with them the Church was obliged to adapt itself to their characteristics."

²⁹² St. Augustin decried those who "pretended shame against a practice which the famous Emperor Theodosius had then so lately submitted to." N. MARSHALL, *supra* note 210, at 102.

²⁹³ 1 H. LEA, *supra* note 235, at 121.

²⁹⁴ 2 O. D. WATKINS, *supra* note 229, at 565. To Benedict, it was a sign of humility on the part of a monk to confess to the abbot "any of the evil thoughts which came to his heart, or the evil deeds secretly committed by him."

dertaking public penance. The first significant development, then, was the abatement of public penance.

Over time, the practice of public penance became restricted to serious offenses that gave rise to public scandal.²⁹⁵ Offenses committed in private, no matter how serious, eventually warranted private penance only. Impetus for this change came partly from Pope Leo's letter to the bishops of Campania in which he demanded an end to the practice of "publishing out of a paper the nature of such crimes as had been privately confessed. . . because private confession to the priest was. . . sufficient to the expiation of guilt."²⁹⁶ Leo's position, therefore, retreats from the earlier notion that one of the reasons for formal, public procedures is to edify the congregation. Indeed, if private confession to the priest is sufficient, there is no need for any public measures. However, neither Leo nor any of the other major figures in the Roman Church of that time was ready to go that far.

Watkins describes four major strands of influence leading to the adoption of private, rather than public, penance on the continent of Europe.²⁹⁷ For brevity's sake, only the penitential of Theodore, Archbishop of Canturbury, is discussed here.²⁹⁸ Written sometime between A.D. 668 and 690, the penitential is essentially a handbook for pastors to help them deal with both individual offenses and church governance.²⁹⁹ It was widely copied and distributed, and local priests often drew up their own penitentials based upon this model.

One of the fifteen categories of personal offenses is entitled "Of Excess and Drunkenness." It prescribes various terms of penance for lay and clerical drunkenness depending upon the nature and setting of the offense.³⁰⁰ Another section,

²⁹⁵ 1 H. LEA, *supra* note 235, at 48. Watkins argues that as of A.D. 650, public penance was still predominant in the Roman Church. 2 O. D. WATKINS, *supra* note 229, at 537.

²⁹⁶ N. MARSHALL, *supra* note 210, at 104. Leo was afraid of driving many from the advantages of penance, who might either be afraid or ashamed of letting their enemies into a knowledge of their guilt, and of exposing themselves thereby to the edge of the laws.... [G]reater numbers would be prevailed with to submit to penance, if the secrets of their consciences should not be made public.

Id.

²⁹⁷ These are (1) the efforts of St. Columbanus and other Celtic missionaries, (2) the penitential of Theodore, (3) St. Boniface and other English missionaries, and (4) the influence of Alcuin and other English scholars upon Charlemagne. 2 O. D. WATKINS, *supra* note 229, at 656-57.

²⁹⁸ Theodore was born in Tarsus, the home of the Apostle Paul, in about A.D. 602. He was appointed Archbishop of Canterbury in A.D. 668. Coming from Tarsus he was undoubtedly familiar with the traditional forms of public penance, yet Theodore evidently eschewed those practices in favor of a private system. There is apparently no evidence of public penance ever being adopted in England in these centuries. *Id.* at 648-54. The penitential attributed to Theodore is acutally "made up mainly of answers given by the archbishop to a certain presbyter, Eoda, and edited, after a period of circulation in a confused state, by a scribe...." MEDIEVAL HANDBOOKS OF PENANCE 180 (McNeill & Gamer eds. 1965).

²⁹⁹ This is the period of Theodore's tenure as Archbishop of Canterbury.

³⁰⁰ For example, "If any Bishop or deacon or any ordained person has had by custom the vice of drunkenness, he shall either desist or be deposed"; "If a lay Christian vomits because of drunkenness, he shall do penance for fifteen days." MEDIEVAL HANDBOOKS OF PENANCE, *supra* note 298, at 184.

"Of Fornication," catalogues a variety of sexual offenses and corresponding penances.³⁰¹ Additional sections cover "Of Thieving Avarice,"³⁰² "Of Manslaughter,"³⁰³ "Of Perjury"³⁰⁴ and a variety of other problems. Private penance involved a variety of penalties. Among these were recitation of psalms, fasting, vigils, flagellation by thong or lash, and temporary exile.³⁰⁵

The provisions concerning reconciliation recognize the departure from Roman practice: "Reconciliation is not publicly established in this province, for the reason that there is no public penance either."³⁰⁶ This raises a question as to the status of repeat offenders. First, penitents were not excluded from communion for the full period of penance: "[W]e . . . out of pity give permission [to partake] after a year or six months."³⁰⁷ Clearly this involves variation in the doctrine of sin and forgiveness in English practice from that of the Roman Church. Second, priests often assigned additional terms of penance for certain offenses committed by laypersons,³⁰⁸ a technical violation of the Council of Toledo's prohibition against the iteration of penance in A.D. 589.³⁰⁹ If one may add more physical exercises, why may one not repeat penance? Roman Church leaders recognized the problem and tried, without complete success, to abolish the penitentials in the Ninth Century.³¹⁰ The Council of Rheims also attempted to reform the practice of confession by calling upon priests to look further into the misdeeds of their people by discriminating among eight classes of vice.³¹¹ The combined effect of all these changes and conflicts in theory and practice was to draw offenders closer to their priests and to promote confession as an essential ecclesiastical function.

³⁰¹ Thus, "If anyone commits fornication with a virgin he shall do penance for one year"; "Sodomites shall do penance for seven years, and the effeminate man as an adulteress"; "he who amuses himself with libidinous imagination shall do penance until the imagination is overcome." *Id.* at 184-86.

³⁰² *E.g.*, "Money stolen or robbed from churches is to be restored fourfold; from secular persons, twofold"; "Whoever has stolen consecrated things shall do penance for three years without fat and then [be allowed to] communicate." *Id.* at 186-87.

³⁰³ *E.g.*, "If a layman slays another with malice aforethought, if he will not lay aside his arms, he shall do penance for seven years; without flesh and wine, three years."; "One who slays a man by command of his lord shall keep away from the church for forty days; and one who slays a man in public war shall do penance for forty days." *Id.* at 187.

³⁰⁴ *E.g.*, "He who commits perjury in a church shall do penance for eleven years"; "He who [commits perjury] however [because] forced by necessity, for the three forty-day periods." *Id.* at 190.

³⁰⁵ *Id.* at 30-34.

³⁰⁶ *Id.* at 195.

³⁰⁷ *Id.* at 194.

³⁰⁸ Thus, "The first canon determined that he who often commits fornication should do penance for ten years; a second canon, seven; but on account of the weakness of man, on deliberation they said he should do penance for three years"; "For masturbation, the first time he shall do penance for twenty days, on repetition, forty days; for further offenses fasts shall be added." *Id.* at 186, 192.

³⁰⁹ *Id.* at 29.

³¹⁰ See the accounts of the Councils of Mainz, Rheims, Tours, Chalon, and Arles in 2 O. D. WATKINS, *supra* note 229, at 700-06.

³¹¹ That is, (1) gluttony, (2) lust, (3) avarice, (4) anger, (5) despondency, (6) moroseness, (7) vainglory, and (8) pride. *Id.* at 705.

The Fourth Lateran Council decreed in A.D. 1215 that henceforth all Christians were to confess to their local priest at least once per year.³¹² By this time complaints against the lax morality of both laity and clergy were commonplace.³¹³ Public penance had given way to "solemn penance," enforced only in the most notorious of cases committed in public, and private penance was now prescribed even for mortal sins.³¹⁴ Priests³¹⁵ exercised great discretion in assigning penance,³¹⁶ and confession became extremely important. In short, the Fourth Lateran Council merely codified into the canon law what had already become standard practice in many churches.³¹⁷

³¹² *Id.* at 748-49. The decree referred only to those who had reached the "years of discretion." He who refused to "fulfil the penance imposed upon him to the best of his ability, reverently receiving the sacrament of the Eucharist at least at Easter" was to "be repelled from entering the church, and when dead let him lack Christian burial." Partaking of communion was now more an ecclesiastical requirement than a privilege. 1 H. LEA, *supra* note 235, at 230, refers to this as "perhaps the most important legislative act in the history of the Church."

³¹³ As early as the Fifth Century, Salvianus, a priest at Marseilles, had written:

The very Church of God, which ought to be in all the appeaser of God, what is she else but the provoker of God? or, outside some very few, who flee from evil, what else is almost every assembly of Christians but a sink of vices? For how many will you find in the Church, of whom it can be said that he is not either a drunkard, or a glutton, or an adulterer, or a fornicator, or a ravisher, or dissolute, or a thief, or a homicide? and, what is worse than any, these various offenses well-nigh endlessly repeated...

1 O. D. WATKINS, *supra* note 229, at 461. Salvianus' observations may be a holdover from Montanist/Novatianist thought in view of the fact that he and his wife "after the birth of their first child agreed to adopt an ascetic life." *Id.*

³¹⁴ 1 H. LEA, *supra* note 235, at 48. 1 O. D. WATKINS, *supra* note 229, at 710-11. Watkins quotes Rabanus in A.D. 819 to this effect:

Those whose sins are secret and have been revealed by them in spontaneous confession to the priest or bishop alone; the penance of these ought to be secret in accordance with the judgment of the priest or bishop to whom they confessed, lest the weak in the church should be scandalised, seeing their penances, but being entirely ignorant of the grounds of them. The presence of weaker members in the church is now used as positive justification for private penance, entirely opposite from the practice of earlier centuries where at least one function of public procedures was to warn and encourage the congregation.

³¹⁵ The concept of priesthood was steadily assuming a more sacerdotal, mediatorial character in place of the intercessory nature of the ministry envisioned earlier. This may have been partly in response to the privatization of sin noted above, the need to develop some means of control over more free-spirited converts, and an attempt to maintain, formally, the integrity and purity of the Church.

³¹⁶ Thus the Council of Worms decreed, in A.D. 868:

Penances are discriminated for penitents by the judgment of the priest according to the difference of sins. The priest ought, therefore, in giving penance to consider the causes of each one by one, also the origin and measure of the offences and to investigate diligently, and to obtain clear knowledge of the sentiments and the groans of the offenders: also to give attention to the qualities of times and persons, of places and ages: in order that, having regard to places, ages, and times, as also the character of the offenses, and to the contrition of each offender, he may not turn away his eyes from holy rules.

2 O. D. WATKINS, *supra* note 229, at 714. Such inquiry was greatly expanded after A.D. 1215. See *infra* notes 319-25 and accompanying text.

³¹⁷ In the English Church, recurrent confession had obtained the "force of law" much earlier. In the *DIALOGUE OF EGBERT*, dated between A.D. 732 and A.D. 766, it states:

Theologians in the Thirteenth Century had come to believe that mortal sins committed after baptism caused the offender to lose his salvation.³¹⁸ Priestly absolution was, therefore, necessary in order to restore the offender to a state of grace. Three major theories of absolution arose. Peter Lombard's followers continued to view absolution as merely confirming God's forgiveness.³¹⁹ Thomas Aquinas argued that "no one could know whether his contrition was sufficient, so that it had to be supplemented by sacramental confession."³²⁰ Finally, Duns Scotus defined sacramental penance as "the absolution of a penitent man, done by certain words that are pronounced with the proper intention by a priest having jurisdiction, efficaciously signifying by divine institution the absolution of the soul from sin."³²¹ The Scotist position was the easiest in terms of what was required of the penitent; the sacrament, *ex opere operato*, did all the work.

The later Middle Ages witnessed the emergence of a "variety of literary forms discussing the Sacrament of Penance."³²² Some of these were guides to practical piety while others were instruction manuals for parish priests. In virtually every case, the necessity of confession was understood in terms of "the power of the keys, a power entrusted to priests by which they could apply the passion of Christ and the forgiveness He won to the sins of penitent Christians."³²³ Frequent confession was encouraged, if not required.³²⁴ Priests were to question penitents as to the precise time, place, nature, and manner of sins committed, and to make certain

Since the times of pope Vitalian and Theodore, archbishop of Canturbury, a custom has obtained (inolevit) in the church of the English, and has come to be held as having the force of law (quasi legitima tenebatur), that not only the clergy in monasteries, but also the laymen with their wives and families should betake themselves to their confessors, and should in these twelve days [*i.e.*, before Christmas] cleanse themselves by weepings with the bestowal of alms from the association of carnal concupiscence, so that they may the purer partake of the communion....

2 O. D. WATKINS, *supra* note 229, at 654.

³¹⁸ 1 H. LEA, *supra* note 235, at 237, points out that, in the the view of the Franciscan, Alexander Hales, the "object of confession is not remission of *culpa* and *poena*, but obedience to the Church, and that neglect or contempt of the sacrament is a new mortal sin which destroys the justification [of the offender in the eyes of God]." Lea also argues that the

great obstacle to the development of the power of the keys and the necessity of confession lay in the belief, to which the Church was fully committed, that the sinner could be justified by contrition and faith. So long as man could deal directly with God the interposition of the priest was not essential....

Id. at 211. Of course, Lea is writing from a Protestant perspective.

³¹⁹ T. TENTLER, SIN AND CONFESSION ON THE EVE OF THE REFORMATION, 22 (1977). Peter Lombard was born in A.D. 1100 and died in A.D. 1160. His most famous work, *SENTENTIAE*, included this understanding of absolution: "...the penitent ought to confess his sins if he have time: and yet, before the confession is in his mouth, if the intention be in his heart, forgiveness is accorded him." 2 O. D. WATKINS, *supra* note 229, at 745. According to Lea, 1 H. LEA, *supra* note 235, at 473, Lombard was the first to enunciate the seven sacraments (baptism, confirmation, the eucharist, penitence, extreme unction, orders, and matrimony).

³²⁰ 2 H. LEA, *supra* note 235, at 4.

³²¹ T. TENTLER, *supra* note 319, at 27.

³²² *Id.* at 28.

³²³ *Id.* at 65.

³²⁴ *Id.* at 73-82.

the penitent revealed all.³²⁵ At first priests heard confessions "in a [sic] open or public place in the sight of all (presumably in the church, even though it is not always explicitly stated)."³²⁶ To avoid embarrassment to the penitent, priests were instructed "not to show amazement; exhibit a contorted face; show revulsion (no matter what enormities are confessed); rebuke the penitent; or exclaim 'Oh, what vile sins!'"³²⁷ Priests were not to allow penitents to leave confession in despair.³²⁸

Some offenses were considered so heinous as to require absolution by the Pope or a bishop. Among those reserved to the Pope were offenses "against the person of clergy and the property and authority of the church"³²⁹ Crimes against ecclesiastical authority or holy objects, some sexual offenses, and certain forms of violence were reserved to the bishops.³³⁰ Excommunication was still practiced, though probably only for various manifestations of contempt for ecclesiastical authority.³³¹

3. Reformation Era

The era of the Protestant Reformation marks the end of "one-church" Christianity. From this time forward Christianity began to splinter into multiple sects and denominations, each differing in ecclesiology, doctrine, and practice. Although one cannot hope to present a comprehensive view of the nature and causes of the Reformation,³³² it is instructive to see once more how variations in doctrine lead to different ecclesiastical practices.

When Martin Luther began to challenge the Roman Church he did so in part because the sacrament of penance had failed to assuage his guilty conscience.³³³ In spite of the fact that he was more scrupulous than most in documenting and confessing sins, Luther never felt satisfied that he had confessed everything. Nothing seemed to help. Finally he hit upon a solution: the doctrine of justification by faith alone.³³⁴ The effect of Luther's discovery was to undercut the whole

³²⁵ *Id.* at 88. See also 1 H. LEA, note *supra* note 235, at 370-76. As one might imagine, the questions could at times probe intimate matters. See T. TENTLER, *supra* note 319, at 91-93, 162-232. Tentler devotes seventy pages to a discussion of "Sex and the Married Penitent" in order to demonstrate how detailed such confessions could be. Above all else, confessions were to be complete. *Id.* at 109.

³²⁶ *Id.* at 82. "The Confessional box with a partition between priest and penitent was not used until the second half of the sixteenth century...." *Id.* at 109.

³²⁷ *Id.* at 94.

³²⁸ *Id.* at 333.

³²⁹ *Id.* at 306.

³³⁰ *Id.* at 307.

³³¹ See *id.* at 302-04.

³³² See, e.g., THE REFORMATION: BASIC INTERPRETATIONS (L. Spitz ed. 1972); R. BAINTON, THE REFORMATION OF THE SIXTEENTH CENTURY (1952); A. DICKENS, THE ENGLISH REFORMATION (1964); A. DICKENS, THE COUNTER REFORMATION (1969); H. EVENNETT, THE SPIRIT OF THE COUNTER REFORMATION (1968); G. WILLIAMS, THE RADICAL REFORMATION (1962).

³³³ R. BAINTON, HERE I STAND: A LIFE OF MARTIN LUTHER 41 (1951).

³³⁴ *Id.* at 49.

theory of penance in the Roman Church. "The contrite man need do only one thing: believe the promise of forgiveness, for that belief constitutes forgiveness itself."³³⁵ Mankind can do nothing to place himself in a favorable position before God, thought Luther; only the recognition that God has already punished sin in the crucifixion can soothe the troubled soul. Thus, in Luther's view, sacramental confession and penance are more an impediment than a means of consolation. "Sinners remain sinners—with all their corruption and weakness. But their sins are not counted against them because they have believed."³³⁶ Luther retained the practice of personal confession, but only as a means of consolation.³³⁷

John Calvin, the Genevan Reformer, was even more thorough in his repudiation of sacramental confession, arguing that "[b]y this ruinous procedure, the souls of those who were affected with some sense of God have been most cruelly racked."³³⁸ Furthermore, he renounced the sacerdotal notion of the priesthood.³³⁹ The church should therefore require only a general, public confession of sin and two forms of private confession, "[B]y disclosing our infirmities to each other, we are to obtain the aid of mutual counsel and consolation. The other is to be made for the sake of our neighbour, to appease and reconcile him if by our fault he has been in any respect injured."³⁴⁰ All other confession is between the individual and God.

One of the most distinctive features of Calvin's theology is his emphasis upon church discipline. Indeed, "the whole jurisdiction of the church relates to discipline To this end, there were established in the Church from the first, tribunals which might take cognisance of morals, animadvert on vices, and exercise the office of the keys."³⁴¹ The power of the keys, of binding and loosing, refers in Calvin's thought to the ministry of the gospel, *i.e.*, preaching, and the "discipline of excommunication which has been committed to the Church."³⁴² Calvin saw three goals in admonishing and excommunicating offenders: (1) "that God may not be insulted by the name of Christians being given to those who lead shameful and flagitious lives, as if his holy Church were a combination of the wicked and abandoned"; (2) "that the good may not, as usually happens, be corrupted by constant communication with the wicked"; and (3) "that the sinner

³³⁵ T. TENTLER, *supra* note 319, at 354.

³³⁶ *Id.* at 361.

³³⁷ *Id.* at 356-58.

³³⁸ J. CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION*, Book III, Ch. IV, sec. 17.

³³⁹ *Id.* at sec. 4.

³⁴⁰ *Id.* at sec. 12.

³⁴¹ *Id.* at Book IV, Ch. XI, sec. 1.

³⁴² *Id.* at secs. 1, 2:

Now, the Church binds him whom she excommunicates, not by plunging him into eternal ruin and despair, but condemning his life and manners, and admonishing him, that, unless he repent, he is condemned. She looses him whom she receives into communion, because she makes him, as it were, a partaker of the unity which she has in Christ Jesus.

Id.

may be ashamed, and begin to repent of his turpitude."³⁴³ Those who pronounce the sentence of excommunication, *i.e.*, the elders, are to inform the congregation of the measures taken, "so that the body of the people, without regulating the procedure, may, as witnesses and guardians, observe it, and prevent the few from doing anything capriciously."³⁴⁴ Nor are civil rulers exempt from ecclesiastical censure.³⁴⁵ The steps to be taken in the disciplinary process depend upon whether the offense is committed in public or in private:

The former class requires not the different steps which Christ enumerates [*i.e.*, in *Matthew* 18:15-17]; but whenever anything of the kind occurs, the Church ought to do her duty by summoning the offender, and correcting him according to his fault. In the second class, the matter comes not before the Church, unless there is contumacy. . . .³⁴⁶

After Luther and Calvin, a third major strand of the Reformation involved the Anabaptist movement. The Anabaptists were dissatisfied with the direction of the Reformers and sought a more intense experience of faith prior to baptism. The term Anabaptist was given to them by their critics. They re-baptized new adherents who had been baptized as infants.³⁴⁷ Generally separatistic, the continental Anabaptists opposed any involvement by the state in spiritual matters, including the suppression of heresy.³⁴⁸

Most Anabaptist groups were communal in orientation; some were actually communistic. Michael Stadler is an example of the latter. His letter, "Cherished Instructions on Sin, Excommunication, and the Community of Goods," written around 1537, outlines a more radical practice than that of Calvin or Luther. In essence, each person was to give himself to the group: "in this community everything must proceed equally, all things be one and communal, alike in the bodily

³⁴³ *Id.* at Ch. XII, sec. 5.

³⁴⁴ *Id.* at sec. 7.

³⁴⁵ After citing the example of Theodosius, Calvin argues:

Great kings should not think it a disgrace to them to prostrate themselves suppliantly before Christ, the King of kings; nor ought they be displeased at being judged by the Church. For seeing they seldom hear anything in their courts but mere flattery, the more necessary is it that the Lord should correct them by the mouth of his priests. Nay, they ought rather to wish the priests not to spare them, in order that the Lord may spare.

Id.

³⁴⁶ *Id.* at sec. 6. Furthermore, Calvin describes a distinction between delinquencies and flagrant iniquities. "In lighter offenses there is not so much occasion for severity, but verbal chastisement is sufficient, and that gentle and fatherly, so as not to exasperate or confound the offender, but to bring him back to himself, so that he may rather rejoice than be grieved at the correction. Flagrant iniquities require a sharper remedy. It is not sufficient verbally to rebuke him who, by some open act of evil example, has grievously offended the Church; but he ought for a time to be denied the communion of the Supper, until he gives proof of repentance." *Id.*

³⁴⁷ W. ESTEP, *THE ANABAPTIST STORY* 10-11 (1963), dates the beginning of Anabaptism from 1525. The goal of what they called "believer's baptism" was to insure a regenerate, pure membership. *Id.* at 181.

³⁴⁸ *Id.* at 195, 197.

gifts of their Father in heaven, which he daily gives to be used by his own according to his will."³⁴⁹ Moreover, "if, then, each member withholds assistance from the other, the whole thing goes to pieces. . . . Where, however, each member extends assistance equally to the whole body, it is built up and grows and there is piece and unity"³⁵⁰ In terms of church discipline, although deacons were to pronounce sentence, the "people, however, as zealous for the Lord should unanimously concur with him and he with them. . . ."³⁵¹ Unanimity, therefore, played an important role in certain Anabaptist circles.

Menno Simons, 1496-1561, was Anabaptistic, but not communistic. His treatise entitled "A Clear Account of Excommunication" describes the Anabaptist practice of "shunning." In brief, those who are excommunicated are to be avoided completely, not merely treated as strangers.³⁵² The aim was to prevent contamination of the faithful and to increase the shame of the offender, all with an eye to repentance and restoration.³⁵³ It extended to heresy as well as other moral offenses.³⁵⁴ Moreover, family members were not exempt:

[O]ur view is that the husband should shun his wife, and the wife her husband, parents their children, and the children their parents, when they become apostate. For the rule of the ban is general. We must consent with the church to their sentence, we must seek their Scriptural shame unto improvement of life, and take care lest they be leavened by them. . . .³⁵⁵

Once again, the communal emphasis is evident.

Brief attention should also be drawn to the Counter Reformation, the Roman Catholic efforts to reform the church in the face of Protestant criticism. In particular, the Council of Trent looms very large. It was Trent that "laid the foundations of an even more complete liturgical and disciplinary, as well as dogmatic, uniformity in the western Churches under its rule."³⁵⁶

If Luther's challenge to Rome was based upon the restoration of the assurance of salvation, Trent served to restore uncertainty. Chapter IX of the Sixth Session, for example, states flatly that "no one can know with the certainty of faith, which cannot be subject to error, that he has obtained the grace of God."³⁵⁷ It

³⁴⁹ SPIRITUAL AND ANABAPTIST WRITERS 277 (G. Williams & A. Mergal eds. 1957).

³⁵⁰ *Id.* at 278.

³⁵¹ *Id.* at 276.

³⁵² THE COMPLETE WRITINGS OF MENNO SIMONS 469 (J. Wenger ed. 1956).

³⁵³ *Id.* at 470-71.

³⁵⁴ *Id.* at 472.

³⁵⁵ *Id.* at 479.

³⁵⁶ H. EVENNETT, THE SPIRIT OF THE COUNTER REFORMATION 96 (1968).

³⁵⁷ THE CANONS AND DECREES OF THE COUNCIL OF TRENT, 35 (H. Schroeder ed. 1941) [hereinafter cited as CANONS]. Again:

No one, moreover, so long as he lives this mortal life, ought in regard to the sacred mystern of divine predestination, so far presume as to state with absolute certainty that he is among

is not surprising, therefore, that the theologians at Trent "maintained that the grace of justification once received is lost not only by infidelity, whereby also faith itself is lost, but also by every other mortal sin, though in this case faith is not lost."³⁵⁸

The Fourteenth Session gave considerable attention to the sacrament of penance and confession, in part to refute the views of those who, like Calvin, "wrongly contort those words [*i.e.*, *John* 20:22] to refer to the power of preaching the word of God and of making known the Gospel of Christ."³⁵⁹ Maintaining the sacerdotal view of the priesthood, Trent decreed "that the form of the sacrament of penance, in which its efficacy chiefly consists, are those words of the minister: *I absolve thee. . .*."³⁶⁰ In order for contrite penitents to be forgiven, they must have previously confessed their mortal sins.³⁶¹ Those who denied the church's position were anathematized.

Finally, there is the matter of the confessional. Lea believes this was a post-Tridentine innovation designed to correct certain abuses and was particularly appropriate for hearing the confessions of women.³⁶² In confession "the priest sits as a judge in the tribunal of conscience,"³⁶³ and must inquire into all the details concerning the nature and circumstances of sin.³⁶⁴ In addition to the pragmatic concern for secrecy, perhaps there was a symbolic justification as well. As conscience lies deep within human nature, the darkened confessional represents that inner "tribunal" and lends credence to the priest's authority to judge. This fully comports with the sacerdotal character of the priesthood.

the number of the predestined. ...For except by special revelation, it cannot be known whom God has chosen to himself.

Id. at 38. This is a not-so-subtle jab at Protestantism, the byword of which was *Sola Scriptura* (scripture alone).

³⁵⁸ *Id.* at 40.

³⁵⁹ *Id.* at 89.

³⁶⁰ *Id.* at 90.

³⁶¹ *Id.* at 93.

it is clear that all mortal sins of which they have knowledge after a diligent self-examination, must be enumerated by the penitents in confession, even though they are most secret and have been committed only against the last two precepts of the Decalogue; which sins sometimes injure the soul more grievously and are more dangerous than those that are committed openly. Venial sins, on the other hand, by which we are not excluded from the grace of God and into which we fall more frequently . . . may . . . be omitted without guilt and can be expiated by many other remedies. In addition, "for the full and perfect remission of sins three acts are required on the part of the penitent...namely, contrition, confession and satisfaction...."

Id. at canon IV at 102.

³⁶² H. LEA, *supra* note 235, at 395, dates use of the confessional from 1565.

³⁶³ *Id.* at 367.

³⁶⁴ See *supra* note 325 and accompanying text. Trent made this essential to the faith. *The Canons supra* note 357, at 103.

B. Current Practices of Representative Denominations

1. Roman Catholic

The Roman Catholic Church is hierarchial in structure, with authority flowing downward from the Pope to bishops, parish priests and other officials. According to canon law, the Pope, "in virtue of his office . . . enjoys supreme, full, immediate and universal ordinary power in the Church, which he can always freely exercise."³⁶⁵ In terms of juridical authority in the church, canon law specifically states that "[t]here is neither appeal nor recourse against a decision or decree of the Roman Pontiff."³⁶⁶ This authority is pastoral as well: "In virtue of his office the Pope holds primacy not only over the universal church but also as pastor of the pastors over them and over the particular churches committed to their care."³⁶⁷

Bishops, as successors of the apostles, are designated "teachers of doctrine, priests of sacred worship and ministers of governance."³⁶⁸ They are demographically assigned to a diocese, "a portion of the people of God which is entrusted for pastoral care to a bishop with the cooperation of the presbyterate."³⁶⁹ To avoid schism and challenges to authority, the episcopal "functions of teaching and of ruling . . . can be exercised only when they [*i.e.*, bishops] are in hierarchial communion with the head of the college [*i.e.*, the Pope] and its members."³⁷⁰ Under canon law, bishops must "present and explain to the faithful the truths of the faith which are to be believed and applied to moral issues."³⁷¹ Although appealable to the Pope, episcopal judgments are authoritative owing to the authority inherent in the episcopal office: "The diocesan bishop is to rule the particular church committed to him with legislative, executive and judicial power in accord with the norm of [canon] law."³⁷² Even though the Pope is the visible

³⁶⁵ THE CODE OF CANON LAW (1983), canon 331, 266. The comments describe these attributes of power:

Supreme power (*suprema*) means there is no power in the church above this power....Full (*plena*) indicates supreme power is not parceled out, as if the pope had only a piece of supreme power.... Immediate (*immediata*) power is one that is not subject to any intermediaries or mediation. There is no middle party in the exercise of this power, and the pope can relate directly to any member of the church whether bishop or religious, cleric or lay—without being constrained to specific channels of civil authorities or ecclesiastical structures.... Ordinary power (*ordinari potestate*) comes with the office...it pertains to the office of the See of Peter as such.

Id. at 268-69.

³⁶⁶ *Id.* canon 333, at 271. The source of papal authority is said to lie in the preeminence of St. Peter among the apostles. *See id.* canon 330, at 265, where the Pope is deemed the successor of Peter, and the bishops are considered the successors of the apostles.

³⁶⁷ *Id.*

³⁶⁸ *Id.* canon 375, § 1 at 319.

³⁶⁹ *Id.* canon 369, at 316.

³⁷⁰ *Id.* canon 375, § 2, at 319.

³⁷¹ *Id.* canon 386, § 1, at 327.

³⁷² *Id.* canon 391, § 1, at 329.

symbol of Catholic unity, as a practical matter, it is the bishops who are charged with holding the church together: "Since he must protect the unity of the church, the bishop is bound to promote the common discipline of the whole church and therefore to urge the observation of all ecclesiastical laws."³⁷³

At the local level, the parish priest serves under the authority of the bishop, "in whose ministry of Christ he has been called to share."³⁷⁴ The priest "is the proper shepherd of the parish entrusted to him"; he is called upon to guide his parishioners, "correcting them prudently if they are wanting in certain areas."³⁷⁵

The Code of Canon Law retains the traditional connection between confession and penance. Confession of a serious offense is mandatory, at least once per year, for all who have "attained the age of discretion."³⁷⁶ Normally, only serious sin—either in quality or in number—warrants the performance of penance. The priest assigns "suitable penances in keeping with the quality and number of the sins but with attention to the condition of the penitent."³⁷⁷ Because public penance is never assigned for secret offenses³⁷⁸ (*i.e.*, those which are not notorious or give rise to extreme scandal), private "confession and absolution constitute the only ordinary way by which the faithful person who is aware of serious sin is reconciled with God and with the Church."³⁷⁹

The Roman Catholic Church claims "an innate and proper right to coerce offending members of the Christian faithful by means of penal sanctions."³⁸⁰ It would appear that these are generally imposed in order to protect ecclesiastical integrity. They may be either "medicinal"³⁸¹ or "expiatory."³⁸² Other penalties may be imposed "which deprive a believer of some spiritual or temporal good and are consistent with the supernatural end of the church."³⁸³ Fines, alms, and restitution would apparently fall into this latter category. Significantly, penal sanc-

³⁷³ *Id.* canon 392, § 1, at 331.

³⁷⁴ *Id.* canon 519 at 419.

³⁷⁵ *Id.* canon 529, at 426.

³⁷⁶ *Id.* canon 989, at 695.

³⁷⁷ *Id.* canon 981, at 689. "A penance, which can be imposed in the external forum, is some work of religion, piety or charity to be performed." *Id.* Canon 1340, § 1, at 910. The church distinguishes between the internal forum, *i.e.*, the realm of conscience, and the external forum, *i.e.*, outward manifestations of piety.

³⁷⁸ *Id.* canon 1340, § 2 at 910.

³⁷⁹ *Id.* canon 960, at 676.

In the sacrament of penance the faithful, confessing their sins to a legitimate minister, being sorry for them, and at the same time proposing to reform, obtain from God forgiveness of sins committed after baptism through the absolution imparted by the same minister; and they likewise are reconciled with the Church which they have wounded by sinning. *Id.* canon 959.

³⁸⁰ *Id.* canon 1311, at 897. This would include excommunication.

³⁸¹ That is, for "correction of the offending party and reintegration within the life of the [church] community." *Id.* canon 1312.

³⁸² That is, to "repair the damage done to the ecclesial order by the offender." *Id.*

³⁸³ *Id.*

tions are only to be used as a last resort when it appears "that justice cannot be sufficiently restored and that the accused cannot sufficiently be reformed by fraternal correction, rebuke, and other ways of pastoral care."³⁸⁴ Moreover, the Code provided safeguards to insure that penal sanctions are not imposed unjustly or capriciously.³⁸⁵

Several offenses warrant penalties under the Code of Canon Law. Only a few of these will be cited here. Automatic excommunication is the most extreme penalty. It applies, *inter alia*, to "an apostate from the faith, a heretic or a schismatic,"³⁸⁶ to a priest who "directly violates the seal of confession,"³⁸⁷ and to a person who "procures a completed abortion."³⁸⁸ Discretionary "just penalties" are imposed for "teaching doctrine condemned by the Roman Pontiff,"³⁸⁹ for "physical violations of persons,"³⁹⁰ and for "publicly either stir[ring] up hostilities or hatred among subjects against the Apostolic See or against an ordinary on account of some act of ecclesiastical power or ministry, or incit[ing] subjects to disobey them."³⁹¹

The Code of Canon Law authorizes an ecclesiastical trial for "a controversy in a matter in which the church enjoys competence."³⁹² Certain matters are, by "proper and exclusive right," subject to ecclesiastical adjudication: "cases concerning spiritual matters or connected with the spiritual" and "the violation of ecclesiastical laws and all those cases in which there is a question of sin in respect to the determination of culpability and the imposition of ecclesiastical penalties."³⁹³ Such trials are generally heard by the diocesan bishop³⁹⁴ and are not

³⁸⁴ *Id.* canon 1341, at 911.

³⁸⁵ Thus, "No one is punished unless the external violation of a law or a precept committed by the person is seriously imputable to that person by reason of malice or culpability." *Id.* canon 1321, § 1, at 901. Also, "A censure cannot be imposed validly unless the accused has been warned at least once in advance that he or she should withdraw from contumacy and be given suitable time for repentance." *Id.* canon 1347, § 1, at 913.

³⁸⁶ *Id.* canon 1364, at 920.

³⁸⁷ *Id.* canon 1388, § 1, at 926. Furthermore, "One who is placed in authority can in no way use for external governance knowledge about sins which he has received in confession at any time." *Id.* canon 894, § 2, at 691.

³⁸⁸ *Id.* canon 1398, at 930.

³⁸⁹ *Id.* canon 1371, at 922. Similarly,

a person who uses a public show or speech, published writings, or other media of social communication to blaspheme, seriously damage good morals, express wrongs against religion or against the church or stir up hatred or contempt against religion or the church is to be punished with a just penalty.

Id. canon 1369, at 921.

³⁹⁰ *Id.* canon 1397, at 930.

³⁹¹ *Id.* canon 1373, at 922-923.

³⁹² See the definitional section, *id.* at 948.

³⁹³ *Id.* canon 1401, at 950.

³⁹⁴ *Id.* canon 1419, at 954.

usually open to the public.³⁹⁵ All members of the tribunal are strictly bound to secrecy.³⁹⁶

Penal procedure may be initiated either by petition or clerical investigation.³⁹⁷ Unless it would be a waste of time or dangerous to someone's good reputation, bishops are to "inquire personally or through another suitable person about the facts and circumstances and about imputability."³⁹⁸ One who undertakes such an investigation may not subsequently serve as judge in a trial.³⁹⁹ The bishop may proceed by decree rather than by trial provided that he "inform[s] the accused about the accusation and the proofs, giving the person the opportunity of self-defense unless the accused neglects to be in court after having been duly summarized."⁴⁰⁰ Penal cases proceeding to trial require the appointment of an advocate for the accused and a "promoter of justice" for the church.⁴⁰¹ Canon law further provides for admission of evidence, judicial interrogation, and right of appeal.⁴⁰²

Lastly, parish priests are subject to penalties for several offenses in addition to that of violating the seal of the confessional. Solicitation of sex in confession warrants "suspension, prohibitions, or deprivations," or "dismissal if more serious."⁴⁰³ Canon 1741 outlines in general terms the conditions under which a priest may be removed from his parish:

- (1) a way of acting which is gravely detrimental or disturbing to the ecclesial community;
- (2) incompetence or a permanent infirmity of mind or body which renders a pastor incapable [of performing his ministry];
- (3) loss of good reputation among the upright and good parishioners or aversion to the pastor which are foreseen as not ceasing in a short time;
- (4) grave neglect or violation of parochial duties which persist after a warning;
- (5) poor administration of temporal affairs with grave damage to the church whenever this problem cannot be remedied in any other way.⁴⁰⁴

³⁹⁵ "Unless a particular law provides otherwise, while cases are being tried before a tribunal only those persons are to be present in court whom the law or the judge decides are necessary to expedite the process." *Id.* canon 1470, § 1, at 964.

³⁹⁶ *Id.* canon 1455, § 1, at 961.

³⁹⁷ *Id.* canon 1501, at 971; canon 1717, at 1024.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* canon 1720, at 1025.

⁴⁰¹ *Id.* canon 1481, § 2, at 967; canon 1430, at 957.

⁴⁰² *Id.* canon 1527, § 1, at 977; canon 1548 § 1, at 981; canon 1628, at 1000. There is no appeal from papal decisions: "The First See is judged by no one." *Id.* canon 1404, at 951.

⁴⁰³ *Id.* canon 1397, at 926.

⁴⁰⁴ *Id.* canon 1741, at 1037.

2. Episcopalian

Although there were a number of factors at work in the English Reformation, as a practical matter the Episcopal Church evolved from King Henry VIII's struggle with Rome for a divorce from Katharine of Aragon.⁴⁰⁵ When the schism finally appeared, the result was a church not quite Protestant, at least in a Lutheran sense, and not quite Catholic. The Episcopal Church therefore marks the transition from Roman Catholicism to Methodism, Presbyterianism, and congregationalism.

The rules of church polity and guidelines for church discipline are found in *The Constitution and Canons of the Protestant Episcopal Church*. In addition, each diocese formulates its own constitution and canons subordinate to that of the national denomination.⁴⁰⁶

The constitutional government of the Episcopal Church is centered upon the General Convention, a bicameral legislative body comprised of the House of Bishops and a House of Deputies.⁴⁰⁷ "Either House may originate and propose legislation, and all acts of the Convention shall be adopted and be authenticated by both Houses."⁴⁰⁸ The House of Bishops elects a Presiding Bishop to serve as "Chief Pastor and Primate" of the church.⁴⁰⁹

Diocesan Bishops are limited in the exercise of the episcopal office to their own dioceses.⁴¹⁰ Each bishop, indeed every clerical official, must profess and

⁴⁰⁵ See A. DICKENS, *THE ENGLISH REFORMATION passim* (1964), for an excellent account of the subject.

⁴⁰⁶ Reference here will be to *THE CONSTITUTION AND CANONS OF THE DIOCESE OF MISSOURI* (1979), [hereinafter cited as *DIOCESE OF MISSOURI*].

⁴⁰⁷ *THE CONSTITUTION AND CANONS OF THE PROTESTANT EPISCOPAL CHURCH* art. I, § 1, at 1 (1982) [hereinafter cited as *CONSTITUTIONS AND CANONS*]. The House of Deputies is made up of presbyteral, diaconal, and lay representatives. The General Convention is to meet at least once every three years; special meetings may be called by the bishops. *Id.* title I, canon I, § 3(a), at 17.

⁴⁰⁸ *Id.* art. I, § 1, at 1.

⁴⁰⁹ The Presiding Bishop has the following duties:

- (1) ...Responsibility for leadership in initiating and developing the policy and strategy of the Church and, as Chairman of the Executive Council of General Convention, with ultimate responsibility for the implementation of such policy and strategy....
- (2) ...Speak[ing] God's words to the Church and to the world, as the representative of this church and its episcopate in its corporate capacity;
- (3) ...[C]onsulting with the Ecclesiastical Authority to insure that adequate interim Episcopal Services are provided;
- (4) Tak[ing] order for the consecration of Bishops ...and, from time to time, assembl[ing] the Bishops of this Church to meet with him....
- (5) Presid[ing] over meetings of the House of Bishops...and...presiding over [Joint] Sessions [of the General Convention]....
- (6) Visit[ing] every Diocese of this Church for the purpose of:
 - (i) Holding pastoral consultations with the Bishop...and, with [his] advice, with the Lay and Clerical leaders of the jurisdiction;
 - (ii) Preaching the Word; and
 - (iii) Celebrating the Sacrament of the Lord's Supper.

subscribe his or her belief in "the Holy Scriptures of the Old and New Testaments to be the Word of God, and to contain all things necessary to salvation; and [to] solemnly engage to conform to the Doctrine, Discipline, and Worship of the Episcopal Church."⁴¹¹ Bishops are to visit each local church in the diocese at least once every three years "for the purposes of examining their condition, inspecting the behavior of the clergy, administering confirmation, preaching the Word, and at his discretion celebrating the Sacrament of the Lord's Supper."⁴¹²

The parish rector has "control of worship and spiritual jurisdiction . . . subject to the Rubrics of the Book of Common Prayer, the Canons of the church, and the godly counsel of the Bishop."⁴¹³ He must "be diligent in instructing the children in the Catechism, and from time to time examine them in the same publicly before the Congregation."⁴¹⁴ Rectors preside at vestry meetings.⁴¹⁵ They are also bound to work for reconciliation between member spouses in the event of marital discord.⁴¹⁶

Most of the provisions respecting ecclesiastical discipline concern clerical officials. There are eight categories of offenses for which bishops and rectors may be tried by an ecclesiastical court:

- (1) crime or immorality;
- (2) holding and teaching publicly or privately, and advisedly, any doctrine contrary to that held by the church;
- (3) violation of the Rubrics of the Book of Common Prayer;
- (4) violations of the Constitution of Canons of the General Convention;
- (5) violations of the Constitution or Canons of his diocese;
- (6) any act involving a violation of Ordination vows;
- (7) habitual neglect of the exercise of the Ministerial Office without cause [or] habitual neglect of Public Worship and Holy Communion;

(iii) Celebrating the Sacrament of the Lord's Supper.

⁴¹⁰ *Id.* art. II, § 3, at 3.

⁴¹¹ *Id.* art 8, at 7.

⁴¹² *Id.* title IV, canon 18, § 2(a), at 89. He is also to examine the records (*i.e.*, baptisms, confirmations, marriages, burials, and the names of all communicant members).

⁴¹³ *Id.* canon 21, § 1(a), at 95.

⁴¹⁴ *Id.* § 2(a). This includes instruction in "the Holy Scriptures and the Doctrines, Polity, History, and Liturgy of the Church." *Id.* at 96.

⁴¹⁵ The vestry is a lay body charged with acting as "agents and legal representatives of the Parish in all matters concerning its corporate property and the relations of the Parish to its Clergy." *Id.* title I, canon 13 §§ 2-3, at 42.

⁴¹⁶ *Id.* canon 18, § 1, at 48. There are three categories of membership: (1) member—defined by reception of water Baptism in the name of the Father, Son and Holy Spirit, (2) member in good standing—all Baptized persons who, for one year, have fulfilled the requirements of the Canon, "Of the Due Celebration of Sundays," and (3) communicants in good standing confirmed by the bishop and have received communion at least three times during the year. *Id.* canon 16, §§ 1-3, at 45-46.

(8) conduct unbecoming a member of the Clergy.⁴¹⁷

Lay members are subject to admonition and, ultimately, suspension from communion if they are "habitually neglectful of the duty of public worship and of other obligations."⁴¹⁸ The church is evidently more concerned with maintaining high moral standards for the clergy than with keeping close watch on the behavior of lay members.

Ecclesiastical trial is available to resolve issues involving clerical offenses. There does not appear to be provision in either the national or Missouri diocesan standards for trials of lay members. Bishops are to appear before courts of bishops, while rectors appear before diocesan courts.⁴¹⁹ *The Constitution and Canons* provides for presentment, personal service of process, discovery, personal hearing with counsel present (provided that counsel is a communicant of the church), and right of appeal.⁴²⁰ Diocesan regulations govern, subject to the *Constitutions and Canons*, trials of rectors, whereas episcopal trials are covered solely by the national provisions.⁴²¹ If ecclesiastical officials are either convicted by a trial court or file a waiver, they may be suspended, removed, or deposed from office depending upon the gravity of the offense.⁴²²

3. United Methodist

The United Methodist Church traces its origin to John Wesley in England during the early Eighteenth Century. Wesley, dissatisfied with the lack of "experiential religion" in the church of England, formed the first Methodist "society" in London in 1739.⁴²³ He emphasized lay preaching and open-air meetings in order to reach the "lost" with his message. Although this brought upon Wesley the wrath of the Church of England, Methodism spread throughout Great Britain and eventually played an important role in the later stages of the First Great Awakening (1720's to 1790's) in colonial America.⁴²⁴ After American independence, Methodists formally organized as a church apart from the Church of England.⁴²⁵

United Methodism is governed through several "conferences." The General Conference, comprised of anywhere between six hundred and one thousand del-

⁴¹⁷ *Id.* title IV, canon 1, § 1, at 111.

⁴¹⁸ DIOCESE OF MISSOURI, *supra* note 406, canon 33, § 1, at 38.

⁴¹⁹ CONSTITUTION AND CANONS, *supra* note 407, title IV, canons 2-3, at 112-13.

⁴²⁰ *Id.* canon 4, at 120-121; canon 33, § 22, at 119; canon 3, § 1, at 113; canon 6, at 125. Presentments are analogous to petitions or informations in civil and criminal trials.

⁴²¹ *Id.* canon 13, at 113.

⁴²² *Id.* canon 12, § 1, at 130.

⁴²³ N. HARMON, UNDERSTANDING THE UNITED METHODIST CHURCH 10 (1974). Wesley was an ordained clergyman in the Church of England. At first Methodism remained within the Church of England. As additional Methodist "societies" sprang up, however, the "connections" among them eventually proved sufficient to support a new denomination. *Id.* at 11.

⁴²⁴ *Id.* at 13. See also W. GEWEHR, THE GREAT AWAKENING IN VIRGINIA, 1740-1790 167 (1930).

⁴²⁵ N. HARMON, *supra* note 423, at 16. This took place in 1784.

egates, one-half lay and one-half clerical, exercises "full legislative power over all matters distinctively connectional."⁴²⁶ It is constitutionally prohibited from revoking or altering the Articles of Religion or the Confession of Faith, from eliminating episcopacy, and from abolishing the right to an ecclesiastical trial.⁴²⁷ Jurisdictional conferences are responsible for electing bishops and formulating rules for church administration.⁴²⁸ The Annual Conference, "the basic body in the Church," votes on all constitutional amendments and on such matters as "ordination, character, and conference relations of ministers."⁴²⁹

Bishops appoint local ministers and exercise "general oversight and promotion of the temporal and spiritual interests of the entire Church."⁴³⁰ They also implement "the rules, regulations and responsibilities prescribed and enjoined by the General Conference."⁴³¹ When presiding over Annual or Jurisdictional conferences, bishops possess the authority to decide questions of ecclesiastical law.⁴³²

Ordained ministers serve subject to episcopal guidance. They are responsible for preaching, performing liturgical functions, and for maintaining order in the local church.⁴³³ Deacons serve in the areas of "administration, education, evangelism, music, health ministries, and community development."⁴³⁴

The United Methodist Church appears uncertain as to how it should enforce the doctrinal and disciplinary standards bequeathed to it by its founders.⁴³⁵ It is certain, however, that "the Articles and the Confession are *not* to be regarded as positive, juridical norms of doctrine, demanding unqualified assent on pain of

⁴²⁶ THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH para. 12, art I, at 22 and para. 15, art. IV, at 23-24 (1980) [hereinafter THE BOOK OF DISCIPLINE]. This power involves authority in several areas:

1. To define and fix the conditions, privileges, and duties of church membership....
2. To define and fix the powers and duties of elders, deacons, supply preachers, local preachers, exhorters, and deaconesses....
5. To define and fix the powers, duties, and privileges of the episcopacy....
7. To provide a judicial system and method of judicial procedure....

⁴²⁷ *Id.* para. 16, art. I, at 25; art. II, para. 17, art. III; para. 18, art. IV.

⁴²⁸ *Id.* para. 26, art. V., §§ 2, 5, at 26-27.

⁴²⁹ *Id.* para. 37, art. II, at 30. Lay representatives are prohibited from voting on the latter three issues.

⁴³⁰ *Id.* para. 59, art. X, at 37; para. 52, art. IV, at 35.

⁴³¹ *Id.*

⁴³² *Id.* para. 56, art. VII, at 36.

⁴³³ *Id.* para. 109, at 107.

⁴³⁴ *Id.* para. 108.

⁴³⁵ Although "there has been no significant project in formal doctrinal re-formulation in Methodism since 1808," by this century "Methodist theology had become decidedly eclectic, with less and less specific attention paid to its Wesleyan sources as such." *Id.* para. 67, at 45.

excommunication.”⁴³⁶ Perhaps the United Methodist Church is undergoing a period of self-examination and redefinition. If so, it is difficult to predict how, or whether, the enunciated standards will be applied.⁴³⁷ For example, a section on the duties of bishops is typically vague:

1. Leaders need to be able to read consensus and integrate it into a living tradition, to be open to the prophetic word, to be skilled in team building, and to be effective in negotiation.
2. Beyond formal systems of accountability, leaders need to open themselves to forms of accountability that they cultivate for themselves through a support group.⁴³⁸

Nevertheless, the traditional standards remain in *The Book of Discipline* and those involved in tort claims against the church should be aware of them. Clerical officials may be charged for the following offenses:

- (a) immorality
- (b) practices declared by the United Methodist Church to be incompatible with Christian teachings
- (c) crime
- (d) failure to perform the work of the ministry owing to
 - (1) indifference
 - (2) incompetence
 - (3) inefficiency
- (e) disobedience to the Order and Discipline of the United Methodist Church
- (f) dissemination of doctrines contrary to the established standards of doctrine of the church
- (g) relationships and/or behavior which undermines the ministry of another pastor.⁴³⁹

⁴³⁶ *Id.* at 49-50. Some of the church's ambivalence is apparent in the following statement: "The last paragraph of the General Rules—providing for the expulsion of delinquent members of the Methodist Societies—poses the agonizing problem of how discipline is to be administered in a community of compassion in extreme cases...." *Id.* at 53.

⁴³⁷ The church admits that they "do not possess infallible rules to follow, or reflex habits that suffice, or precedents for single imitation." *Id.* para. 69, at 72. On the other hand, they point to two interacting general principles: "accountability to the community of the church is an inherent obligation on those who claim that community's support." *Id.* para. 67, at 53.

⁴³⁸ *Id.* para. 502, at 236.

⁴³⁹ *Id.* para. 2621, at 616.

Lay members may be charged with offenses (a), (c), (e) and (f) above.⁴⁴⁰ For example, clerical officials may be tried for homosexuality, a "practice incompatible with Christian teaching,"⁴⁴¹ while lay members may not.

Ecclesiastical trials are considered "an expedient of last resort."⁴⁴² Only after all other attempts at resolution have failed is there to be a written presentation of charges and investigation. Once undertaken, such trials involve *inter alia* notice, the right of an accused to counsel, a written record, and the right of appeal.⁴⁴³

4. Presbyterian

Presbyterianism owes much to the ecclesiastical system John Calvin erected in Geneva, Switzerland during the mid-Sixteenth Century. Calvin's influence spread throughout Europe but it was primarily in Great Britain and, more particularly, in Scotland, that Presbyterianism took root and flourished.⁴⁴⁴ From there it crossed the Atlantic in part with the New England Puritans in the Sixteenth Century and more completely with the Scotch-Irish immigrants of the early Eighteenth Century.⁴⁴⁵

The Presbyterian Church of the United States of America (PCUSA) is the largest presbyterian denomination in this country. There are also several smaller denominations of Presbyterians, among which are the Orthodox Presbyterian Church (OPC), the Presbyterian Church in America (PCA), and the Reformed Presbyterian Church in North America (RPNA).⁴⁴⁶ The smaller denominations tend to be more conservative than the PCUSA, but they all share a commitment to Presbyterian polity and each professes at least formal adherence to the Westminster Confession of Faith.

The standards for the PCUSA are in *The Plan for Reunion* approved in 1982. Several principles of presbyterian government are notable:

- b. This church shall be governed by presbyters (elders and ministers of the Word);
- c. These presbyters shall come together in governing bodies (traditionally called judicatories or courts) in regular gradation;
- d. Presbyters are not simply to reflect the will of the people, but rather to seek together to find and represent the will of Christ;

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* para. 71F, at 90.

⁴⁴² *Id.* para. 2624, at 619.

⁴⁴³ *Id.* at 620, 622-23.

⁴⁴⁴ See A. Dickens, *supra* note 405, at 198-201, 313-21.

⁴⁴⁵ *Id.* at 336-40.

⁴⁴⁶ One should also be aware of the Association of Reformation Churches, consisting of only a handful of churches but exercising intellectual influence beyond its numbers, especially among the smaller presbyterian denominations.

- e. Decisions shall be reached in governing bodies by vote, following opportunity for discussion, and a majority shall govern;
- f. A higher governing body shall have the right of review and control over a lower one and shall have power to determine matters of controversy upon reference, complaint or appeal;
- g. Presbyters are ordained only by the authority of a governing body;
- h. Ecclesiastical jurisdiction is a shared power, to be exercised jointly by presbyters gathered in governing bodies.⁴⁴⁷

This summary of ecclesiology emphasizes the fact that presbyterianism is representative in nature and thus distinguishable from both hierarchial and congregational forms of church government.

Appointment to office is by election, and one so chosen must adhere to the traditional doctrines and polity of the church.⁴⁴⁸ Members must voluntarily submit to presbyterian church government.⁴⁴⁹ Owing to its Calvinistic heritage, presbyterianism places considerable emphasis on the moral character of its members. Thus, the elders are called upon "to strengthen and nurture the faith and life of the congregation committed to their charge They should inform the pastor and Session of those persons and structures which may need special attention."⁴⁵⁰

The governing body in each local church is the "Session." Made up of "the pastor or co-pastors, the associate pastors and the elders in active service," the Session is responsible for admitting members into the church, leading the church in all of its ministries, and serving as a judicial tribunal in disciplinary matters.⁴⁵¹ Beyond the Session, the Presbytery is the governing body for geographically associated local churches. The Presbytery is responsible for examining, ordaining, receiving, installing, dismissing, and otherwise disciplining ministers, serving as a court of appeal in judicial matters, and asserting "original jurisdiction in any case in which it determines that a Session cannot exercise its authority."⁴⁵² Higher courts include the Synod and, finally, the General Assembly.

The Plan for Reunion defines church discipline as

the orderly exercise of authority resulting from the application of principles and laws which this Church as derived from the Scriptures for the instruction, training, and correction of its members, officers, congregations, and governing bodies. Church discipline is exercised within the context of pastoral care and oversight by means of administrative review or judicial process.⁴⁵³

⁴⁴⁷ The Plan for Reunion, § G-4.0301, at 50.

⁴⁴⁸ *Id.* §§ G-6.0107, .0104278, at 58.

⁴⁴⁹ *Id.* § G-5.0202, at 54.

⁴⁵⁰ *Id.* § G-6.0304, at 61.

⁴⁵¹ *Id.* §§ G-10.0101, .0102, at 87.

⁴⁵² *Id.* § G-11.0103, at 98.

⁴⁵³ *Id.* § D-1.0100, at 185.

Judicial process is available in disciplinary cases for various offenses, defined as "any act or omission by a member or officer of the Church that is contrary to the Scriptures or the Constitution of the PCUSA."⁴⁵⁴ Original jurisdiction for offenses committed by lay members lies in the Session, whereas the Presbytery has original jurisdiction for ministers' offenses.⁴⁵⁵

Initiation of a disciplinary case begins either by accusation, investigation by a governing body, or self-accusation.⁴⁵⁶ Investigation is by "a very special disciplinary committee designated by the governing body."⁴⁵⁷ If there is enough evidence to prosecute, charges are to be filed.⁴⁵⁸ Provisions for trial include personal service, right to counsel by a PCUSA member, and citations for witnesses to appear (they must also be PCUSA members). In a disciplinary case, each side presents its evidence, the church proceeding first, and each side may object to evidence and cross-examine witnesses.⁴⁵⁹ "If the accused is found guilty, or after the guilty plea, the Session or permanent judicial commission may hear evidence as to mitigation, rehabilitation and redemption and shall then determine the degree of censure to be imposed."⁴⁶⁰ After trial, "the moderator shall in open meeting announce the verdict for each specification and charge separately. If the accused has been found guilty, the moderator shall announce the degree of censure to be imposed by the governing body."⁴⁶¹ Censures include, from least to most extreme, rebuke, temporary exclusion from the exercise of ordained office or membership, and removal from office or membership.⁴⁶² The public nature of the proceedings reflects Calvin's view that church members provide a check on potential arbitrariness. No sentence is enforced "pending an appeal or until after the time for appeal has expired."⁴⁶³

5. Congregational/Baptist

Congregational government is in some respects the easiest, and in others, the most difficult form of ecclesiastical polity to describe. It is the easiest because there is no connectional or hierarchial structure involved. On the other hand, it is the most difficult because there are so many varieties of congregationalism that generalization is virtually impossible. For example, some traditional congrega-

⁴⁵⁴ *Id.* § D-1.0800, at 187.

⁴⁵⁵ *Id.* § D-5.0100, at 194. Only the Presbytery may dissolve the relationship between a pastor and the church. *Id.* G-14.0601, at 158.

⁴⁵⁶ *Id.* § D-7.0200, at 201.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* There is a statute of limitations; charges must be filed within three years of the offense or within one year of the beginning of preliminary procedure, "whichever appears first." *Id.* § D-7.1100, at 204.

⁴⁵⁹ *Id.* § D-8.1200, at 211.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* § D-8.1500, at 212.

⁴⁶² *Id.* §§ D-10.0200, .0300, .0500, at 223-24.

⁴⁶³ *Id.* § D-8.1700, at 213.

tional churches are virtually presbyterian in internal practice, while Baptist churches, also congregational in polity, tend to be more democratic.

In his influential *Baptist Church Manual*, J. M. Pendleton set forth three important elements of Baptist polity: "1. That the governmental power is in the hands of the people. 2. The right of a majority of the members of a church to rule, in accordance with the law of Christ. 3. That the power of a church cannot be transferred or alienated, and that church action is final."⁴⁶⁴ Pastors and lay religious officers rule in Baptist churches first by example and secondarily through formal procedures adopted as a constitution and by-laws of the local church.⁴⁶⁵ When necessary, Baptists do not hesitate to resort to disciplinary measures.⁴⁶⁶

Personal offenses, those committed by one individual against another, require only one-to-one reconciliation. General offenses, those "committed against a church in its collective capacity," particularly if they are of "an infamous or scandalous character," require swift disciplinary action.⁴⁶⁷ The latter include "rejection of any of the fundamental doctrines of the gospel"; any activity which "seriously disturbs the union and peace of a church"; and "[d]isorderly and immoral conduct in all its forms."⁴⁶⁸ Some offenses warrant immediate excommunication: "If a church-member is guilty of adultery, or murder, or pejury, or theft, or forgery, or drunkenness, or any kindred crime, he deserves exclusion without trial."⁴⁶⁹ Any offender who "give[s] clear evidence, and satisfactory proofs of a true, sincere, evangelical repentance"⁴⁷⁰ will not be excommunicated. Where excommunication is possible, the proceedings are generally public.⁴⁷¹ Because Baptists traditionally have jealously guarded the independence of the local church, there is no authoritative declaration of how ecclesiastical trials are to be conducted.⁴⁷²

⁴⁶⁴ J. PENDLETON, *BAPTIST CHURCH MANUAL* 101-02 (1966). H. Dana argues that "the direct access of every soul to Christ requires democracy in organization." H. DANA, *A MANUAL OF ECCLESIOLOGY* 110 (1941).

⁴⁶⁵ "There must be, in the exercise of pastoral authority, nothing like priestly lordship of clerical desperation; but the influence of pastors must grow out of the fact that they faithfully obey the will of Christ, the great Shepherd, and thus set an example worthy of imitation." J. PENDLETON, *supra* note 464, at 29.

⁴⁶⁶ According to Pendleton, the three goals of church discipline are to protect and promote the glory of God, the purity of the churches, and the spiritual good of the disciplined. *Id.* at 143-45.

⁴⁶⁷ *Id.* at 125-40.

⁴⁶⁸ *Id.* at 132-37.

⁴⁶⁹ *Id.* at 141.

⁴⁷⁰ J. GARRETT, JR., *BAPTIST CHURCH DISCIPLINE* 46 (1962) (quoting from an eighteenth century Baptist disciplinary manual).

⁴⁷¹ "To proceed regularly in this solemn business, the church must cite an accused member to appear, either at a stated church meeting of business, or at an occasional meeting for that purpose in order that he may have a fair trial and an opportunity of making his defense, if he has any to make." *Id.* at 47.

⁴⁷² Of course, Baptists argue that "the only resort we have to find out what is true church law, is the Bible itself as the great fountain of all law.... The Bible alone furnishes that immutable law which *must* be recognized by the churches as binding at all times and under all circumstances." E.

Interest in church discipline has increased markedly in the past several years. A number of new books dealing with the subject have been published, particularly from an evangelical, Protestant perspective.⁴⁷³

IV. THE TORT CLAIMS

This part of the article examines the extent to which the concepts of non-involvement in intrafaith disputes and the nonentanglement required by church-state separation have been applied in claims brought before state and lower federal courts in a manner consistent with the principle of institutional autonomy for churches. The focus is on actions sounding in tort that arguably implicate religious liberty.⁴⁷⁴ Accordingly, tort claims against churches for premises liability and the now commonplace negligence action arising out of the use of church-owned motor vehicles, matters for which churches are rightly accountable since the virtual abandonment of immunity for charitable organizations, are of no concern here.⁴⁷⁵ Moreover, there can be little question that religious officers and organizations are liable in tort for assault, battery,⁴⁷⁶

MARSHALL, A TREATISE UPON BAPTIST CHURCH JURISPRUDENCE 44 (1896). Marshall was an attorney in the nineteenth century. As a further example of Baptist pride in their independence, Marshall argues that "we [i.e., Baptists] belong to that church which alone has religious freedom and self-government, in the true gospel meaning of these terms." *Id.* at 25.

⁴⁷³ See, e.g., D. BAKER, BEYOND FORGIVENESS (1984); J. LANEY, A GUIDE TO CHURCH DISCIPLINE (1985); J. WHITE & K. BLUE, HEALING THE WOUNDED (1985); D. WRAY, BIBLICAL CHURCH DISCIPLINE (1978); F. YEAKLEY, IN DEFENSE OF CHURCH DISCIPLINE (1984).

⁴⁷⁴ Legal doctrines of vicarious liability, most notably *respondeat superior*, apply in the law of torts and make the employer or master liable for the torts of the employee or servant. In general, *respondeat superior* applies where the master has a right to control the physical activities of the servant, and the tortious act occurred while undertaking duties for the benefit of the master. RESTATEMENT (SECOND) OF AGENCY § 219 (1958). In their search for a "deep pocket," plaintiffs sue not only the religious officer who acted tortiously and the local church, but may also bring in religious bodies at higher levels within the denomination. Depending upon the polity of the denomination, imposing vicarious liability "up the line" when the church polity dictates local control, may impinge upon first amendment rights. Although this issue is outside the scope of this article, see E. GAFFNEY & P. SORENSEN, ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS (1984); R. HAMMER, PASTOR, CHURCH & LAW Ch.10, § F and Ch. 12, § C (1983 & Supp. 1986).

⁴⁷⁵ See *supra* notes 16-18. Religious organizations in many respects are dissimilar from charities, of course; most notably the religion clauses of the first amendment protect only the former. Also beyond the scope of this article are tort claims arising out of accidents that occur during improper supervision of children and injuries attributable to hazardous social activities such as swimming, boating, and hay rides.

⁴⁷⁶ See *Conway v. Carpenter*, 80 Hun. (N.Y.) 428, 30 N.Y.S. 315 (1894), where a pastor had been dismissed by his congregation. When he nonetheless entered the church, occupied the pulpit, and refused to leave when requested, he was forcibly ejected. Claim for assault and battery were brought for injuries suffered by the violent ejection. See also, *Michigan v. Lewis*, No. 83-S-0450 (Mich. Dist. Ct., Allegan Co. Oct. 18, 1983); *Michigan v. McGee*, No. 83-S-0452 (Mich. Dist. Ct., Allegan Co. Oct. 18, 1983); and *Michigan v. Jones*, No. 83-S-0451 (Mich. Dist. Ct., Allegan Co. Oct. 18, 1983). These cases are prosecutions for criminal assault. Gwendolyn Harris, a member of the House of Judah sect, was struck by the three defendants on at least two occasions from which

false imprisonment,⁴⁷⁷ and the like, all claims which involve coercive and often violent activity.⁴⁷⁸

she sustained serious injury. A written consent signed by her purporting to authorize punishment for wrongdoing, including beating, burning, stoning, and hanging—sanctions said to be based on Old Testament scriptures—were held not to be valid as against public policy. The court also denied the defense that striking Harris was an exercise of religious discipline protected by the Free Exercise Clause.

⁴⁷⁷ The tort of false imprisonment is described in RESTATEMENT (SECOND) OF TORTS § 35 (1965), as follows:.

- (1) An actor is subject to liability to another for false imprisonment if
 - (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
 - (b) his act directly or indirectly results in such a confinement of the other, and
 - (c) the other is conscious of the confinement or is harmed by it.
- (2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.

See generally, *id.* at §§ 36-45; W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 11 (5th ed. 1984).

A claim of false imprisonment was dismissed in *Molko v. Holy Spirit Association for the Unification of World Christianity*, 179 Cal. App. 3d 450, 224 Cal. Rept. 817, *rev. granted*, 228 Cal. Rptr. 159 (Cal. 1986) for the reason that civil courts are barred by the first amendment from inquiring into the allegedly "mind-control" recruiting techniques of sects, so long as force or the threat of force was not used. There was no evidence that the former members now suing their church had been forced to stay against their will other than the sect's "spiritual hold on its members." Compare *George*, No. 27-75-65 (Cal. Super. Ct., Orange Co.), (suit by ex-Krishna member alleging false imprisonment, civil conspiracy to hide her from parents, libel, invasion of privacy, and intentional infliction of emotional distress; appeal from judgment of \$9.7 million) and *Gallon v. House of Good Shepard*, 158 Mich. 361, 122 N.W. 631 (1909) (false imprisonment claim lies against parachurch society for reform of wayward girls) with *O'Moore v. Driscoll*, 135 Cal. 770, 28 P.2d 438 (1933) (false imprisonment claim dismissed as against religious order).

⁴⁷⁸ *Cantwell*, 310 U.S. 296, broadly outlines the limits of first amendment liberties when dealing with activities that are violent or threaten an immediate breach of the peace. In *Cantwell*, the Court overturned a criminal conviction for breach of the peace of an itinerant preacher. Although the minister had approached members of the public with verbal and written information offensive to many, no violence took place or was likely. In dicta, explaining speech-related conduct that a state could legitimately regulate, the Court said:

The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious....

One may...be guilty of the offense [breach of peace] if he commits acts or makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended....

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse....

The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive

A. *Pastoral Counseling and Spiritual Guidance*

In times of illness, depression, the death of a family member, marital difficulty, economic distress, and other personal crises, one's rabbi, priest, or pastor is often sought for consolation and guidance. This assistance is offered without compensation or other obligation, and no contractual relationship arises therefrom. The nature and variety of the counsel given surely must differ as widely as the many religious faiths that flourish in America. The formal training of ministers to give such counsel, as well as the length and quality of experience in doing so, is equally diverse. Furthermore, clerics typically open their doors not only to members of their faith but to anyone who seeks their assistance.

There is, of course, no attempted quality assurance by government testing and licensing of America's clergy, nor could there be consistent with the first amendment. When a counselee believes that he or she received improper or inadequate advice, or some other offense is suffered as a result of the counselor-counselee relationship, should damages be recoverable in tort? That is the topic of this section. The cases easily arrange themselves into four types: clergy malpractice, breach of confidential communication, sexual seduction and molestation, and the increasingly antiquated action for alienation of affections.

1. Clergy Malpractice

Malpractice has reference to a particular standard of conduct which is undertaken by a given profession or trade. As a specialized type of negligence, the act of committing malpractice is defined as follows:

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.⁴⁷⁹

others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish. *Id.* at 308, 309, 310. Although *Cantwell* involved criminal prosecution, the same constitutional limits on the scope of religious liberty would apply to state-created or sanctioned tort actions.

⁴⁷⁹ RESTATEMENT (SECOND) OF TORTS § 299A (1965). In the ordinary case the required undertaking is contractual, but such is not a prerequisite to liability. *Id.* at comment c. The normal skill and knowledge the law requires will vary if there are differing "schools of thought" within the profession. *Id.* at comment f.

Notwithstanding the considerable attention given the tort of clergy malpractice in both popular⁴⁸⁰ and scholarly journals,⁴⁸¹ only *Nally v. Grace Community Church of the Valley*⁴⁸² has invoked an adjudication on the merits of what might be called "ordinary" malpractice.⁴⁸³ "Ordinary" malpractice refers to a claim by the injured party that a cleric gave advice that fell below that fairly expected of the profession, or neglected to refer the counselee to someone who by training or experience was more apt to assist with the problem.

In March 1980, suit was filed in Los Angeles County, California, by the parents of Kenneth Nally, a 24-year-old seminary student who committed suicide the prior year.⁴⁸⁴ In this wrongful death action, the Nallys sued Grace Community Church, a large nondenominational Protestant congregation, its pastor, the Rev. John MacArthur, and three additional members of the pastoral staff. The complaint stated three separate counts which alleged clergyman malpractice, negligence, and outrageous conduct.⁴⁸⁵

⁴⁸⁰ See H. MALONY, T. NEEDHAM & S. SOUTHARD, *CLERGY MALPRACTICE* (1986) (guidance for ministers by three ordained ministers and specialists in pastoral counseling); J. CLEARY, *Clergy Malpractice—The Insurance Carrier's Perspective* (1985) (unpublished paper); THE CHURCH AND THE LEGAL EXPLOSION (Preferred Risk Mutual Ins. Co. ed. 1985); Postel, *Clergy Malpractice: An Emerging Field of Law*, 21 TRIAL 91 (Dec. 1985); Wise, *supra* note 19; McMenamin, *supra* note 20; *Hauled Into Court: The New Trials of Ministry*, LEADERSHIP 127 (Winter 1985); Girdner, *The Clergy Malpractice Case: Did Pastors Spur Suicide?* 7 NAT'L L.J. 6 (May 13, 1985); Ranii, *A Concept Gets More Respect: Clergy Malpractice—The Prayer for Relief*, 7 NAT'L L.J. 1 (Mar. 4, 1985); Galante, *Calif. Court Allows 'Clergy Malpractice' Trial*, 6 NAT'L L.J. 9 (July 16, 1984); Quade, *Holy Terror: Clergy Buying Insurance*, 60 A.B.A.J. 1206 (1983); Carey, *Churches Are Taken To Court More Often In Internal Disputes: Denominations Are Worried By Suits Over Discipline And Pastoral Counseling, But Setbacks Are Few*, WALL STREET J., Apr. 9, 1985 at 1, 21; Thomsen, *Clergy Malpractice Goes to Court—Is Religious Freedom on the Line?* 80 LIBERTY 13 (Nov./Dec. 1985).

⁴⁸¹ S. ERICSSON, *CLERGY MALPRACTICE: AN ILLEGAL LEGAL THEORY* (1986); J. EIDSMOE, THE CHRISTIAN LEGAL ADVISOR 513-22 (1984); R. HAMMAR, *supra* note 474, Chap. 4, § E: Funston, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W.L. REV. 507 (1983); Hotz, *Diocesan Liability for Negligence of a Priest*, 26 CATH. LAW. 228 (1981); BERGMAN, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN. FERN. V. L. REV. 47 (1981); ERICSSON, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163 (1981); McMenamin, *Civil Interference and Clerical Liability*, 45 Cath. Law 275 (1985); Note, *Nally v. Grace Community Church*, 157 Cal. App. 3d 912, 1 ARIZ. ST. L.J. 213 (1985); Note, *Religious Torts: Applying the Consent Doctrine as Definitional Balancing*, 19 U. CAL. DAVIS L. REV. 949 (1986).

⁴⁸² No. NCC 18668 B (Cal. Super. Ct., Los Angeles Co.).

⁴⁸³ Other than *Nally*, apparently the only other "ordinary" clergy malpractice claim is *Neufang v. Cahn*, No. 79-8143 (Fla. Cir. Ct., Broward Co. filed May 2, 1979). In *Neufang* a claim of malpractice was brought against a psychiatrist and a hospital by the widow of a former patient. The surviving spouse alleged that defendants negligently discharged her husband from their care, and as a result the decedent shot her and then killed himself. The defendant-psychiatrist filed a third party complaint against West Side Baptist Church and its pastor, the Rev. George E. Dunn. The third-party action alleged that Dunn counseled with the decedent and knew or should have known of any dangerous propensities. Further, Dunn is alleged to have a duty to take action to protect others from any such dangerous tendencies of his counselees, and that he was negligent in that he failed to take any action by informing the plaintiff of the danger.

⁴⁸⁴ *Nally*, No. NCC 18668-B. (Cal. Super. Ct., Los Angeles Co.).

⁴⁸⁵ Ericsson, *supra* note 481, 16 VAL. U.L. REV. at 164.

In count one for clergy malpractice, the Nallys alleged that the four pastoral defendants had advised their son to read the Bible, pray, listen to taped sermons, and seek counsel from the church staff. They stated that the defendants were aware that Kenneth Nally was suffering from depression, had suicidal tendencies, and thus was in need of care from a licensed psychiatrist or clinical psychologist. The Nallys further alleged that notwithstanding this knowledge of these special needs, the defendants discouraged and effectively prevented their son from seeking professional help outside the church.⁴⁸⁶

In count two, the parents alleged that the church was negligent in the training, selection, and employment of its spiritual counselors. Further, this count maintains that Kenneth Nally sought these pastoral counselors shortly before his suicide, but despite his search, they were not reasonably available to him.⁴⁸⁷

The third count, for outrageous conduct, alleged that the defendants ridiculed, disparaged, and denigrated the Roman Catholic faith in which the Nallys had raised their son, and that this contributed to his feelings of guilt, anxiety, and depression. Finally, it was alleged that the defendants created an environment which caused Kenneth Nally to spend most of his time at the church or with its members, thereby effectively isolating him from contact and communication with persons outside the church who could have helped him.⁴⁸⁸

Citing several first amendment concerns, the defendants initially entered a demurrer. The trial court denied this plea because the allegation that Kenneth Nally was deterred from obtaining professional psychiatric or psychological help did state a claim upon which relief could be granted.⁴⁸⁹ Extensive discovery followed. Deposition testimony revealed that in the few months before his suicide, Kenneth Nally was seen by several professionals outside the church, including psychiatrists and psychologists. Indeed, the defendants and others at the church had encouraged the Nally's son to seek professional care and personally assisted in these referrals. One physician recommended to Kenneth's father that Ken be admitted to a psychiatric hospital, if necessary against Ken's will, but the parents declined to do so. After the trial court considered this testimony and heard argument concerning the many first amendment difficulties with the complaint, summary judgment was granted in favor of all defendants on all counts.⁴⁹⁰

The plaintiffs appealed, and in a 2-1 decision the California Court of Appeals reversed the summary judgment and remanded the case for trial.⁴⁹¹ The panel

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.* at 164-65.

⁴⁸⁸ *Id.* at 165.

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ *Nally*, 157 Cal. App. 3d 912, 204 Cal Rptr. 303. The Supreme Court of California ordered *Nally* to be deleted from 157 Cal. App. 3d on August 30, 1984. Therefore all citations to *Nally* will be limited to 204 Cal. Rptr.

majority found that the available evidence left open a reasonable inference that the church and its staff taught that suicide was an acceptable or desirable alternative to "living in sin." Another possible inference, the court said, was that the pastoral staff at the church "recklessly cause[ed]. . . [suicidal] persons extreme emotional distress through their counseling methods if those persons did not measure up to the pastors' religious ideals."⁴⁹² The court acknowledged that California law had previously permitted recovery in suicide cases only when a defendant's actions toward the victim were both intentional and done with the specific intent of causing injury. Nevertheless, the court reasoned that since "reckless disregard of the probability of causing emotional distress" had been held by the state supreme court to satisfy the "intent" requirement for the tort of "intentional infliction of emotional distress," the plaintiffs stated a cause of action for the wrongful death of their son.⁴⁹³

We hold that a cause of action for wrongful death arising out of intentional infliction of emotional distress was adequately pled by the allegations that the individual defendants, as agents of the church, knowing that Kenneth Nally was depressive and had suicidal tendencies, exacerbated his feelings of guilt, anxiety, and depression with reckless disregard that their conduct would increase the likelihood that Kenneth Nally would commit suicide and that, as a result of this conduct, Kenneth Nally's depression increased, causing him to commit suicide.⁴⁹⁴

Having determined that a cause of action exists for reckless disregard of a person's suicidal tendencies, the majority rejected arguments that a spiritual counselor is protected by the religion clauses of the first amendment.

We hold that, while defendants' religious beliefs are absolutely protected by the First Amendment, the free exercise clause of the First Amendment does not license intentional infliction of emotional distress in the name of religion and cannot shield defendants from liability for wrongful death for a suicide caused by such conduct.⁴⁹⁵

Upon determining that genuine issues existed as to whether Kenneth Nally's suicide stemmed from the defendants' intentional infliction of emotional distress, the court declined to decide other issues in the case such as whether the pastoral staff had a duty to refer Kenneth to a licensed mental health counselor or whether the church had a duty to adequately train its pastors in counseling techniques.⁴⁹⁶

In a lengthy dissent, Justice Hanson argued for upholding the summary judgment. He noted that neither the complaint nor the affidavits in the record pled the factual basis for reckless infliction of emotional distress as discussed by the majority. The dissenting justice found no reasonable basis in the record for in-

⁴⁹² *Nally*, 204 Cal. Rptr. at 306.

⁴⁹³ *Id.* at 307.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.* at 308-09.

⁴⁹⁶ *Id.* at 309.

ferring that Grace Church and its staff either condoned or approved of suicide or that they prevented Kenneth Nally from seeking outside help.⁴⁹⁷ The overall effect of the majority opinion, he argued, was to create a higher duty for an unpaid spiritual counselor than existed in California law for a paid psychiatrist. Moreover, such a duty would seriously threaten guarantees of free speech and the free exercise of religion.⁴⁹⁸

Upon remand, and after three weeks into a jury trial, the court in May 1985 granted defendants' motion for nonsuit on all three counts in the complaint.⁴⁹⁹ In so ruling the trial judge squarely placed his holding on considerations of religious liberty and the separation of church and state:

Ken Nally sought the counsel of various members and pastors of Grace Community Church, and he did this of his own free will. Men should have the liberty to seek counsel from the pastor whose teaching they choose to follow, and the state should not interfere in their choice of pastor or the teachings they wish to accept from that pastor. There is no compelling state interest for this court to interfere in the pastoral counseling activities of Grace Community Church. Such interference would result in excessive entanglement of the state in church and religious beliefs and teachings. The court would by necessity, if it so interfered, have to set standards of competence and standards of training of counselors, determine who may or may not be counseled, determine if the problems counseled were moral or mental and monitor the counseling for all time to come. There is no compelling state interest to climb the wall of separation of church and state and plunge into the pit on the other side that certainly has no bottom.

Therefore, the court finds the defendants had no legally recognizable duty in law to (1) investigate Ken Nally's alleged suicidal manifestations, (2) inform other professionals and his family of his suicidal manifestations, (3) refer Ken Nally to a psychologist or psychiatrist or other professional, (4) train and employ competent counselors to secular standards, and (5) make counselors available to Ken Nally.⁵⁰⁰

The trial judge further held that there was inadequate evidence that the "outrageous conduct" alleged in the third count breached any legal duty owed to Kenneth Nally, or if it did, there was inadequate evidence that the conduct was the proximate cause of his suicide.⁵⁰¹ The Nallys have again appealed.⁵⁰²

The trial court's nonsuit appears entirely correct and would seem to be required by the first amendment. In a claim for negligence, the civil law must define a standard of care or conduct required of one in the position of defendant. In the law of torts this is generally accomplished by reference to some objectively

⁴⁹⁷ *Id.* at 318-19.

⁴⁹⁸ *Id.* at 318.

⁴⁹⁹ *Nally*, No. NCC 18668-B (Cal. Super. Ct., Los Angeles Co.) .

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

⁵⁰² This appeal was docketed in the Second District of California on March 20, 1986.

determinable obligation or duty for the protection of others. Yet, the civil courts cannot determine the "standards of the profession" when the profession is as differentiated as that of rabbi, priest, or pastor. Moreover, even if a "state of the art" could be intelligibly defined, the civil law could not impose such uniformity on all religious officers without impinging upon the free exercise rights of some who understand the dictates of their faith to be different from this universal, court-imposed duty.⁵⁰³ Counsel for the Nallys sought to overcome this definitional quandary by borrowing the professional standards of psychological and psychiatric counseling, and "bootlegging" them into the world of clergy and church. This entails having to untangle guidance directed at "spiritual health" from that addressing "mental health," and then applying the standards of the mental health professions only to the latter. Both in theory and practice, however, the "cure of minds" and the "healing of souls" does not segment so neatly.⁵⁰⁴

A second matter that is problematic with the claim of clergy malpractice is establishing the point at which a counselor-counselee relationship arises. Because no fee is typically charged and no contract arises, this is doubly hard. Moreover, spiritual guidance utilizes a variety of settings and means, including formal confession (a sacrament in some churches but not others), one-on-one situations in a cleric's office behind closed doors, telephone calls, small and intimate group settings, classrooms, and even pulpit sermon teachings about how to live one's life.⁵⁰⁵ The possibilities are endless should the courts begin to examine audio-cassettes, video-cassettes, tracts, books, radio, and even television programs. Clergy typically have no pecuniary interest in the counseling relationship. So, unlike other professionals, clerics cannot be expected to "select and screen their counselees, determining the availability of their services on such factors as ability to pay, office hours, or scheduling."⁵⁰⁶ Further, *Nally* raises the interesting proposition that clerics have a legal duty to be reasonably accessible when sought by a desperate counselee. Civil judges or juries can hardly be at ease in imposing a duty of availability on all churches regardless of size, resources, and other variables.⁵⁰⁷

A third difficulty with malpractice is whether the standard of the profession varies with the ecclesiastical office. Is a rabbi, priest, pastor, and lay elder to be held to the same standard regardless of training and wide variances from church to church in the authority and obligation of religious offices?⁵⁰⁸ On the other hand, if the legal duty varies with the nature of the church office, the scope of

⁵⁰³ ERICSSON, *supra* note 481 at 165-66, 171-72.

⁵⁰⁴ *Id.* at 166. To be sure, the courts deal with many technical and scientific matters beyond the expertise of judge and jury, but spiritual guidance malpractice is of a different character. Science is "empirical in nature. The issues raised in clergyman counseling cases are not empirical, but religious. They are not conducive to judicial review because they lack objective standards." *Id.* at 169.

⁵⁰⁵ *Id.* at 169-70.

⁵⁰⁶ *Id.* at 170.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 170-71.

training, and the expectations of church members or the counselee, then the civil courts cannot help but find themselves probing deeply into the forbidden terrain concerning the spiritual duties of an ecclesiastical office and interpretation of religious dogma. Further, if diverse standards of care are to be applied, then the law of torts will vary from church to church. The equal protection difficulty with such an approach is obvious.

Finally, if there is a legal duty to refer counselees to licensed professionals in the disciplines of medicine and psychology, this will clash with the religious beliefs of some faiths. It is well known that there is mistrust between some religious communities and the social science of psychology and the medical science of psychiatry. Each holds radically differing views of the nature of humankind⁵⁰⁹ and the cause and treatment of many ailments such as depression and alcoholism. When clerics regard mental health professions with suspicion, free exercise problems will result should the law require cross-disciplinary referral.⁵¹⁰ The issue is made apparent by turning the situation around and contemplating a legal requirement for referrals to clergy by mental health professionals should the problem be "spiritual" rather than "mental."

2. Breach of Confidential Communication

Either by common law, statute, or rule of court, the vast majority of jurisdictions in the United States recognize an evidentiary privilege for communications between clergy and counselee.⁵¹¹ Although the statutes and rules of evidence vary in wording, they typically provide that a cleric shall not, without the consent of the person making the confession, be examined as to any private communication made to him or her while acting in the role of spiritual adviser.⁵¹² Professor Wigmore reasoned that the privilege has adequate grounds for recognition by the law of evidence since it satisfied the four fundamental conditions to the establishment of a privilege against judicially-compelled disclosure:

- (1) that the communications originate in a confidence that they will not be disclosed;
- (2) that the element of confidentiality must be essential to the maintenance of the relation between the parties;
- (3) that the relation must be one which in the opinion of the community ought to be sedulously fostered; and,

⁵⁰⁹ See P. VITZ, *PSYCHOLOGY AS RELIGION: THE CULT OF SELF-WORSHIP* (1977).

⁵¹⁰ J. EIDSMOE, *supra* note 481, at 516-18.

⁵¹¹ See generally Note, *Developments in the Law--Privileged Communications*, 98 HARV. L. REV. 1450, 1555-62 (1985); Annot., 71 A.L.R.3d 794 (1976); Annot., 49 A.L.R. 3d 1205 (1973); Annot., 22 A.L.R. 2d. 1152 (1952).

⁵¹² See W. TIEMANN & J. BUSH, *THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATION AND THE LAW* (2d ED. 1983). With the exception of West Virginia, the appendix reprints rules and statutes of all the states. *Id.* at 207-32.

- (4) that any injury which would inure to the relation by the disclosure of the communication would be greater than the benefit which would be gained by requiring it to be revealed.⁵¹³

Suppose that a rabbi, priest, or pastor did disclose a confidential communication without the counselee's authorization. Apparently there are no generally reported opinions where a counselee or communicant has sought to hold a religious officer liable in tort for such an improper disclosure, nor do the statutes and rules of court address this eventuality.⁵¹⁴

In a much publicized suit, Ms. Sheridan Edwards recently filed such a claim against her priest, the St. Stephens Episcopal Church, and others alleging that the confidential relationship that resides with her as a communicant was breached causing her considerable damage. In separate counts, the case of *Edwards v. St. Stephens Episcopal Church*⁵¹⁵ alleges emotional distress, fraud, negligent misrepresentation, concealment, invasion of privacy, negligence, and breach of fiduciary duty. Edwards' complaint states that in August 1984 she made a sacramental confession to her priest, Father William Rankin. She further alleges that she requested Rankin to keep the matters revealed during the confession in confidence.⁵¹⁶ Edwards then told Rankin that as treasurer for the church's women's guild she had stolen about \$28,000 of the guild's funds. Rankin promptly informed church authorities and soon the matter was reported to the police. Subsequently Edwards was charged with embezzlement. Over the objection of Edwards' attorney, Rankin was permitted to testify at the criminal trial concerning his conversation with Edwards. She was convicted and faces a sentence of seven months in jail. An appeal from this conviction is pending. One of the issues raised on appeal is whether it was error to admit into evidence the priest's testimony.

Church officials deny that the meeting between Edwards and Rankin was a formal confession, a well-defined rite in the Episcopal Church that is normally attended by certain ecclesiastical formalities. Episcopal churches offer the sacrament of confession and priestly absolution.⁵¹⁷ Privacy is assured by canon law

⁵¹³ 8 WIGMORE ON EVIDENCE § 2396 (McNaughton ed. 1961).

⁵¹⁴ See authorities *supra* notes 511-512. A very different situation from that posed in the text was held to be cause for liability of a church in *Alberts v. Devine*, 395 Mass. 59, 479 N.E.2d 113, cert. denied, 106 S. Ct. 546 (1985). In *Alberts* the Massachusetts Supreme Court ruled that the first amendment does not preclude the imposition of liability on officials in the United Methodist Church for inducing a minister's psychiatrist to violate the duty of confidentiality to his patient. Officials in the church were found to have forced the minister into early retirement as a result of having obtained information from his psychiatrist without authorization. The court said that the cause of action for wrongful inducement did not interfere with church discipline nor did it involve a dispute over religious doctrine or practice.

⁵¹⁵ *Edwards v. St. Stephens Episcopal Church*, No. 844020 (Cal. Super. Ct. San Francisco Co., filed Aug. 5, 1985).

⁵¹⁶ *Id.* p. 3 of the Complaint.

⁵¹⁷ Confession in the Episcopal Church, when practiced, is much less formal than that of the Roman Catholic Church. See J. GUNSTONE, *supra* note 238, at 75.

and a priest can be disciplined if the vow of confidentiality is broken.⁵¹⁸ The defendants in *Edwards* maintain that the trial court properly admitted into evidence Rankin's testimony because the communication did not take place during a confessional rite. Accordingly, they argue, Wigmore's four fundamental conditions for establishing an evidentiary privilege were not present.

Whether Wigmore's four elements were present is a question that must be answered by the trier of fact. Disposition of that question in the criminal case may well be binding by virtue of collateral estoppel in *Edwards v. St. Stephens Episcopal Church*. Assuming *arguendo* that the four conditions were met, Rankin should be liable in tort for breach of confidential communication. This is only logical. If churches and their clerics are to have the benefits which attend the evidentiary privilege for clergy-counselee communications, conversely they must bear the consequences when they disclose such conversations without permission to do so. Fairness dictates that reasonable responsibilities follow along with the benefits. Likewise, if the communication was not privileged (as ruled by the trial judge in *Edwards*' criminal prosecution), then the defendants should not be liable in tort for disclosing *Edwards*' statements implicating her in felonious activity.

Although the physician-patient and clergy-counselee relationships are in many respects dissimilar, there are numerous cases recognizing that the disclosure by a physician of confidential information about a patient constitutes actionable invasion of privacy.⁵¹⁹ And when confidences have been broken there is always the possibility of claims for intentional or negligent infliction of emotional distress. In all such matters, however, it must be remembered that even unauthorized disclosures of confidential communications are immune from tort liability in certain instances. For example, liability will not follow from disclosing a counselee's plans to commit a future crime.⁵²⁰ Nor would an action lie where the canonical procedures of the church provide for the use of private communications in the course of ecclesiastical discipline of a church member or one holding a religious office.⁵²¹ So long as the communication is utilized only within the disciplinary context and the scope of authority conferred on the church judicatory body is

⁵¹⁸ See CONSTITUTION AND CANONS, *supra* note 407, at 117.

⁵¹⁹ See Annot., 20 A.L.R. 3d 1109 (1968).

⁵²⁰ Cf. *Nix v. Whiteside*, 106 S. Ct. 988 (1986) (attorney's responsibility when advised by client of intent to give perjured testimony). Indeed, the dealing with a habitual child molester, there may be a legal duty to give warning to those in danger. See *infra* note 524.

⁵²¹ See *Cimijotti v. Paulsen*, 219 F. Supp. 621 (N.D. Iowa 1963). This case concerned a slander claim brought by a husband against his wife and two other individuals. The alleged slander involved statements made by the defendants to Roman Catholic priests. The statements to the priests were made in the course of attempts by the wife to have disciplinary sanctions imposed by the church against her husband. The other two defendants came as witnesses to offer corroborating evidence to the priests. When the plaintiff deposed the priests, they refused to answer questions citing the secrecy required by canon law. The district court upheld the defense of qualified privilege in the tort action, both as to the wife and the other defendants when their allegedly slanderous statements were made in the course of church disciplinary proceedings.

not exceeded or abused, the disclosure would be immune from tort liability as a matter of religious liberty.⁵²²

3. Seduction and Child Molestation

Few would have the hardihood to claim first amendment immunity in defense of a suit charging a rabbi, priest, or pastor with sexual improprieties involving others connected with the church. These cases fall into one of two patterns: either a minister is alleged to have taken sexual advantage of a woman he is counseling,⁵²³ or a cleric is said to have sodomized young children placed under his charge.⁵²⁴ Because no credible argument can be made that such conduct is even "arguably religious," or caused by the promptings of spiritual duty, these torts are not shielded by protestations of religious liberty.

In *Destefano v. Grabrian*,⁵²⁵ the plaintiff initiated a complaint against a Roman Catholic priest, the Diocese of Colorado Springs, and the plaintiff's estranged wife. He alleged that the priest engaged in a sexual relationship with his wife after she went to him for marital counseling. The complaint stated counts for breach of fiduciary duty, negligent counseling, and outrageous conduct. The defendant-wife in turn cross-claimed against the diocese for negligent supervision and training of the priest. Surprisingly, the trial court dismissed. The judge found

⁵²² See *infra* notes 589-624 and accompanying text. Breach of confidential communication is frequently alleged as one of the tortious claims arising from suits over church discipline. See, e.g., *Roberson v. Evangelical Orthodox Church*, No. 91129 (Cal. Super. Ct., Santa Cruz Co. filed Oct. 15, 1984) (case over discipline of pastor alleging, *inter alia*, disclosure of confidential communication as invasion of privacy); *Kelly v. Christian Community Church*, No. 545117 (Cal. Super. Ct., Santa Clara Co. filed Mar. 21, 1984) (case by church member alleging, *inter alia*, confidential communication to licensed family counselor disclosed to church and wrongfully used in course of discipline).

⁵²³ See, e.g., *Lund v. Caple*, 100 Wash. 2d 739, 675 P.2d 226 (1984) (husband's suit against church and pastor alleging pastor's sexual relations with wife during counseling sessions); *Milla v. Tamayo*, No. C 485488 (Cal. Super. Ct., Los Angeles Co. filed Sept. 20, 1984) (suit by woman against seven priests and Roman Catholic archdiocese alleging priests induced her to have sexual relations with them over a two year period, and that one of the priests fathered her child; on Nov. 11, 1984 the complaint was dismissed as barred by the statute of limitations and plaintiff has appealed); *Smotrich v. Silverman*, No. C 352330 (Cal. Super. Ct., Los Angeles Co. filed Jan. 22, 1981), *writ of prohibition denied sub nom. Sinai Temple v. Superior Court*, No. 64348 (Cal. App. 2d Mar. 12, 1982) (unpublished opinion), *stay denied*, No. 64348 (Cal. Sup. Ct. May 20, 1983), *cert. denied*, 459 U.S. 861 (1982) (suit by husband alleging rabbi had sexual relations with his wife in the course of marital counseling; discovery permitted into synagogue's termination decision of Rabbi Silverman).

⁵²⁴ See, e.g., *Anderson v. Diocese of Duluth*, No. 159581 (Minn. D. Ct., St. Louis Co. filed Mar. 30, 1983) (reported in 5 *Nat'l L.J.* 3 (May 16, 1983)) (suit against Roman Catholic diocese for tortious injury resulting from priest's homosexual acts with minor; church officials alleged to be liable because they failed to act on knowledge of priest's homosexuality obtained during confessional); *Gastal v. Gauthe*, No. 84-48175-A (La. Dist. Ct., Vermillion Parish Feb. 7, 1986) (suit by parents and child against priest and Roman Catholic diocese for homosexual molestation of minor; jury verdict of \$1 million for child and \$250,000 for parents).

⁵²⁵ *Destefano v. Grabrian*, No. 84-CV0773 (Colo. D. Ct., El Paso Co. July 26, 1984) (unreported opinion), *aff'd*, No. 84-CA 0973 (Colo. Ct. App. Aug. 8, 1986).

that all of the counts would require the application of ecclesiastical standards to the performance of duties by the priest as dictated by religious authority, and noted the high concern expressed in Supreme Court decisions with entanglement in the internal affairs of a church.

The disposition in *Destefano* seems misguided. The case does indeed involve a priest's standard of behavior toward a woman who comes to him for spiritual counseling. But in cases of sexual seduction or child molestation, the standard of care in the law of torts need not depend upon or look to the duties of priests as defined by the diocese. Regardless of what the church claims are its canonical standards for the proper behavior of priests, the civil law can say that sexual seduction of a counselee is not even "arguably religious," that it is wrongful and thus punishable in tort. By allowing such claims, there is no judicial entanglement whatsoever in the relationship between diocese and priest or in other spiritual matters, and the church can hardly be expected to maintain that its priests are supposed to conduct themselves in this manner toward parishioners as a matter of religious doctrine and practice. For reasons of public policy, a state may elect to abolish tort claims for seduction, criminal conversation (adultery), and the like, and several states have done so.⁵²⁶ But such is not required by the religion clauses of the first amendment.⁵²⁷

4. Alienation of Affections

A surprising number of tort actions have been brought for alienation of affections⁵²⁸ said to have been either the result of religious teaching or the consequence of the spiritual influence of others.⁵²⁹ Tort claims that protect the marital relationship such as alienation of affections still survive in a minority of jurisdictions.⁵³⁰ Occasionally a claim of alienation of affections is raised secondarily

⁵²⁶ See *Lund*, 100 Wash. 2d 739, 675 P.2d 226 (action by husband dismissed because facts state a claim for alienation of affections now abolished in Washington); *Destefano*, No. 84-CV0773 (Colo. Dist. Ct., El Paso Co.) (complaint by husband dismissed on the alternative ground that matter essentially was action for alienation of affections, seduction, and criminal conversation (adultery), claims now abolished in Colorado). See also *infra* note 544.

⁵²⁷ Cf. *Cantwell*, 310 U.S. at 310 (dictum suggesting that religious liberty will not prevent state from punishing acts of "assault or threatening of bodily harm," "intentional discourtesy," and "personal abuse").

⁵²⁸ The tort of alienation of a spouse's affections is defined in RESTATEMENT (SECOND) OF TORTS § 683 (1977), as follows:

One who purposely alienates one spouse's affections from the other spouse is subject to liability for the harm thus caused to any of the other spouse's legally protected marital interests.

The section should be read together with *Id.* §§ 684-92.

⁵²⁹ See generally Annot., 31 A.L.R. 115 (1924).

⁵³⁰ See cases *supra* note 526. See generally RESTATEMENT (SECOND) OF TORTS §§ 683-92 (1977); W. PROSSER & W. KEETON, *supra* note 477, §§ 124.

in actions over church discipline⁵³¹ or in matters of sexual seduction of a spouse.⁵³² Of interest in this subsection, however, is the situation where the preaching or other religious teaching of a church is believed and obeyed by one spouse. These ideas are then said to have led to a separation in the marriage. Should the courts entertain a cause by the abandoned spouse against the church and religious teachers for having influenced his or her partner to leave the marriage?

Although the older cases often do not discuss the first amendment dimensions to these torts,⁵³³ the recent cases generally do so.⁵³⁴ In *Bradeska v. Antion*,⁵³⁵ the plaintiff brought an action for alienation of affections against the Radio Church of God, its founder and broadcaster, its school of theology, and the minister of one of the denomination's local congregations. The plaintiff maintained that defendants' teachings to his wife that marriage to a previously divorced man is adulterous resulted in the breakup of the marriage. Verdicts were returned by a jury against all four defendants.⁵³⁶ Judgments on the verdicts were reversed on appeal because of insufficient evidence and because of the first amendment's guarantees of religious liberty, freedom of speech, and freedom of the press.⁵³⁷ The evidence showed that three of the defendants communicated with plaintiff's wife only by way of a daily radio program, form letters, a magazine, and a pamphlet. The local minister communicated with plaintiff's spouse only when she attended his church services at which he preached, and in a letter to her stating the church's doctrine concerning divorce and remarriage.⁵³⁸ The defendants did indeed teach that a divorced man should not remarry, and to do so is adulterous. But, said the court, sectarian organizations have the "right to advocate and to disseminate any religious faith, no matter how offensive and ridiculous to others

⁵³¹ See, e.g., *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975). See *infra* notes 622-624 and accompanying text; *Roberson v. Evangelical Orthodox Church*, No. 91129 (Cal. Super. Ct., Santa Cruz Co. filed Oct. 15, 1984). See *infra* note 588.

⁵³² See cases *supra* notes 523-527 and accompanying text. See also, *Strock v. Pressnell*, No. 96739 (Ohio Ct. Com. Pleas, Lorain Co., Sept. 15, 1986) (dismissing for first amendment reasons, suit against church and minister alleging clergy malpractice filed by husband whose wife engaged in sexual relationship with minister during counseling).

⁵³³ See, e.g., *Hughes v. Holman*, 110 Or. 415, 223 P.730 (1924) (husband may sue religious sect for alienation only if malicious intent is shown); *Carrieri v. Bush*, 69 Wash. 2d 536, 419 P.2d 132 (1966) (claim by husband against religious sect held actionable).

⁵³⁴ In addition to the cases discussed in the text, see *Barnum v. Rajneesh Foundation International*, No. 120035 (Kan. Dist. Ct., Johnson Co. Nov. 1, 1983) (unpublished order-defendants' motion to dismiss granted; suit by former wife against guru and religious sect for causing marriage to fail); *Waites v. Watchtower Bible and Tract Soc'y of Pennsylvania*, No. CV 80-24401 (Mo. Cir. Ct., Jackson Co. filed Nov. 6, 1980) (suit by husband for alienation of affection brought against national denomination, local church, and named church members).

⁵³⁵ *Bradeska v. Antion*, 21 Ohio App. 2d 67, 255 N.E.2d 265 (1969).

⁵³⁶ *Id.* at 68, 255 N.E.2d at 266.

⁵³⁷ *Id.* at 73, 255 N.E.2d at 269.

⁵³⁸ *Id.* at 69-74, 255 N.E.2d at 267-69.

[and such] is guaranteed by the Constitution of the United States, and is binding on the states."⁵³⁹

Bradeska was followed in *Radecki v. Schuckardt*,⁵⁴⁰ where two men jointly sued a Roman Catholic splinter group, the Tridentines, and its leader, Bishop Schuckardt. The Tridentines teach that their followers must adhere to a particular doctrinaire approach to the Catholic faith, and if necessary, followers should leave their spouse should he or she interfere with the practices of the movement.⁵⁴¹ The plaintiffs' wives had enrolled the minor children in the Tridentine School in a distant state. This was opposed by the plaintiffs, and when they sought to return the children to the home, the wives with assistance from the defendants hid the children from them. Divorce proceedings were pending in both marriages.⁵⁴² Jury verdicts in favor of plaintiffs were reversed by the appeals court, citing several free exercise cases of the Supreme Court. These facts did not, said the court, "present situations where a strong or compelling state interest to protect societal peace, safety, order and morals,"⁵⁴³ justifying exceptions to defendants' religious rights.⁵⁴⁴

Finally, consider *Washington v. Hill*,⁵⁴⁵ where the plaintiff brought suit against the Rev. Dewitt Hill, minister of the Greater Trinity Church of God in Christ, seeking damages for alienation of affections. The complaint alleged that Hill interpreted the Bible so as to cause plaintiff's wife to view him as a "sinful creature," knowing that such would cause a dissolution of the marriage. Ironically, the trial court allowed the action to go forward. Nevertheless, the jury returned a verdict for Hill. For reasons of church-state separation, the action should have been dismissed when first initiated. Because of the requirement that the state not interfere in church teaching and practice, "[t]he law knows no heresy."⁵⁴⁶ Injury said to be attributable to religious speech, print, or broadcasting cannot be regarded as actionable in tort short of "some substantial threat to public safety, peace or order."⁵⁴⁷

⁵³⁹ *Id.* at 73, 255 N.E.2d at 269.

⁵⁴⁰ *Radecki v. Schuckardt*, 50 Ohio App. 2d 92, 361 N.E.2d 543 (1976).

⁵⁴¹ *Id.* at 94, 361 N.E.2d at 544.

⁵⁴² *Id.* at 93, 361 N.E.2d at 544.

⁵⁴³ *Id.* at 96, 361 N.E.2d at 546.

⁵⁴⁴ A similar action against the Tridentines is found at *O'Neil v. Schuckardt*, 55 U.S.L.W. 2107 (Idaho 1986) (setting aside \$1 million jury verdict in claim by former husband and his five children against Tridentine movement for alienation of affections).

⁵⁴⁵ *Washington v. Hill*, No. 80-423 (Ark. Ct. App. Mar. 4, 1981) (unpublished opinion) (judgment for defendant affirmed; first amendment defenses not discussed).

⁵⁴⁶ *Watson*, 80 U.S. (13 Wall.) at 728.

⁵⁴⁷ *Sherbert*, 374 U.S. at 403 (citing as examples, *Cleveland v. United States*, 329 U.S. 14 (1946) (criminal prosecution of Mormon for transporting a woman across state lines for polygamous practices); *Prince*, 321 U.S. 158 (criminal prosecution for violation of child-labor laws); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (criminal prosecution for refusal to obtain smallpox vaccination); *Reynolds*

B. Church Discipline

1. Selection, Discipline, and Removal of Religious Officers

Even before the Supreme Court held that the strictures of the first amendment were binding on the states through the fourteenth amendment,⁵⁴⁸ the common law evidenced a general unwillingness to get involved in the discipline or removal of religious officers, whether it be for alleged departures from correct doctrine or some other act of misconduct in the eyes of the church. It has long been axiomatic that courts in America would not entertain suits asserting a right to attain or hold ecclesiastical office.⁵⁴⁹ Such matters were characterized as “purely ecclesiastical,” and as such it was agreed that civil authorities had no jurisdiction to interfere in this way with internal church governance.⁵⁵⁰ Upon brief reflection it can be seen that the same undesirable interference takes place—albeit somewhat more indirectly—should civil courts entertain large damage actions in tort filed against churches by clerics either disgruntled over the loss of an ecclesiastical office or being the recipient of a religious sanction. It was often said that unless a lawsuit affected title or possession of property, rights of contract, or a person’s civil rights, the courts would not adjudicate disputes over ecclesiastical offices.⁵⁵¹ The reservation as to “civil rights,” however, left the matter of tort claims, such as for defamation, in uncertainty. The problem was one of determining just when a church’s internecine matter has so spilled over into the secular realm as to make injury to reputation or other wrong a matter of interest to all of society and consequently a “civil right” redressible in a tort action for damages.

Although the older cases understandably do not discuss the first amendment, they are nonetheless solicitous of religious liberty.⁵⁵² Communications concerning

v. United States, 98 U.S. 145 (1878) (criminal prosecution of a Mormon for polygamy)). The Sherbert Court stated:

It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, “[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations.”

Sherbert, 374 U.S. at 406 (quoting *Thomas v. Collins* 323 U.S. 516, 530 (1945) (regulation of labor union activities struck down in face of free speech and assembly challenge)). The regulatory means utilized by the state must be the least restrictive to First Amendment rights and still achieve its goals. *Sherbert*, 374 U.S. at 407.

⁵⁴⁸ See *supra* note 30.

⁵⁴⁹ See, e.g., *Chavis v. Rowe*, 93 N.J. 103, 459 A.2d 674 (1983), involving a claim for damages by a deacon and his wife for having been removed from his post, or “defrocked,” apparently over a dispute with the pastor. After expressing doubt as to whether one’s status as a deacon even entails a judicially-protected interest, the court affirmed a dismissal citing First Amendment concerns.

⁵⁵⁰ Ellman, *Driven From the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV., 1378, 1388 (1981).

⁵⁵¹ See C. ANTIEAU, P. CARROLL & T. BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* 95-96 (1965); W. TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* 118-47 (1948).

⁵⁵² See C. ZOLLMANN, *AMERICAN CIVIL CHURCH LAW* 349-53 (1917); Annot., 87 A.L.R. 2d 453, 471-75 (1963); Annot., 20 A.L.R.2d 421, 471-480, 499-500 (1951); 63 A.L.R. 649 (1929).

a pastor or priest made in the course of church discipline are qualifiedly privileged.⁵⁵³ Thus, statements or writings said to be defamatory are not actionable, even if later determined to be untrue, unless it can be shown that the defendant was motivated by actual malice.⁵⁵⁴ Moreover, the plaintiff must present to the trier of fact "clear and convincing" evidence that the defendant's motive was malicious.⁵⁵⁵ When truth is raised as a defense, the plaintiff has the burden of proving that the statements or writings were false.⁵⁵⁶

The scope of the qualified privilege is quite generous. It not only applies to charges and defenses made before church disciplinary tribunals,⁵⁵⁷ but also protects communications to religious officers having authority within the church.⁵⁵⁸ Entries in church minutes and other records concerning disciplinary proceedings,⁵⁵⁹ publications in church newspapers concerning the final disposition of disciplinary actions,⁵⁶⁰ and letters to individuals with reason to know of a cleric's qualifications, are qualifiedly privileged.⁵⁶¹ Moreover, the testimonial privilege before a church's disciplinary hearing panel applies not only to statements of accusers and replies in defense of the one charged with misconduct, but also protects allegedly defamatory communications to the panel concerning individuals not members of the church.⁵⁶²

⁵⁵³ See, e.g., *Slocinski v. Radwan*, 83 N.H. 501, 144 A. 787, 63 A.L.R. 643 (1929); *Van Vliet v. Vander Naald*, 290 Mich. 365, 287 N.W. 564 (1939); *Stewart v. Ging*, 64 N.M. 270, 327 P.2d 333 (1958); *Murphy v. Harty*, 238 Ore. 228, 393 P.2d 206 (1964); *Browning v. Gomez*, 332 S.W.2d 588 (Tex. Civ. App. 1960); *Church of Scientology of California v. Green*, 354 F. Supp. 800 (S.D.N.Y. 1973); Annot. 63 A.L.R. at 650/65.

⁵⁵⁴ The Supreme Court now requires a showing of actual malice when the defamation is of a public figure. See *supra* note 198. Cf. *Creekmore v. Runnels*, 359 Mo. 1020, 224 S.W.2d 1007 (1949) (charging a pastor with heresy in course of discipline not libelous per se).

⁵⁵⁵ *Joiner v. Weeks*, 383 So.2d 101, 107 (La. Ct. App. 1980). The Supreme Court now requires clear and convincing evidence if the defamation is of a public figure. See *supra* note 199.

⁵⁵⁶ *Van Vliet v. Vander Naald*, 290 Mich. 365, 370, 287 N.W. 564, 567 (1939). The Supreme Court now requires this if the defamation is of a public figure. See also *supra* note 198.

⁵⁵⁷ Annot., 87 A.L.R.2d 453, 469-75 (1963); Annot., 20 A.L.R.2d 421, 471-80, 499-500 (1951) Annot., *supra* note 553, at 651-53, 655-56. Cf. *Hellstern v. Katzer*, 103 Wis. 391, 79 N.W. 429 (archbishop's remarks about priest not privileged when made from pulpit during worship service).

⁵⁵⁸ Annot., *supra* note 553, at 653.

⁵⁵⁹ *Patmont v. Int'l Christian Missionary Ass'n*, 142 Minn. 147, 171 N.W. 302 (1919) (entry on the minutes of corporation holding Bible college and church regarding college dean); *Cranfill v. Hayden*, 22 Tex. Civ. App. 656, 55 S.W. 805 (1900) (entry on church minutes regarding church delegate).

⁵⁶⁰ *Redgate v. Roush*, 61 Kan. 480, 59 P. 1050 (1900) (notice in church paper regarding preacher); *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698 (1879) (publication in denominational newspaper regarding minister); *Cranfill*, 22 Tex. Civ. App. 656, 55 S.W. 805 (publication in church newspaper regarding church delegate); *Van Vliet*, 290 Mich. 365, 287 N.W. 564 (official church newspaper); *Stewart v. Ging*, 64 N.M. 270, 327 P.2d 333 (1958) (church newspaper).

⁵⁶¹ *Church of Scientology v. Green*, 354 F. Supp. 800 (1973) (internal church document); *Murphy v. Harty*, 238 Or. 228 393 P.2d 206 (1964) (letters between church officials); Annot. *supra* note 553, at 657; but cf. *State v. Bienvance*, 36 La. Ann. 378 (1884) (circulation of libelous pamphlet outside of church concerning fitness of priest does not enjoy qualified privilege).

⁵⁶² See Annot., *supra* note 553, at 657-58.

The case of *Joiner v. Weeks*⁵⁶³ is illustrative of how the state courts presently deal with these tort actions by clerics. The Rev. Wayne Joiner, a minister in the United Pentecostal Church, was removed from "ministerial fellowship" for fiscal improprieties involving a member of his church and attendant misbehavior when questioned about the affair. The action of disfellowship was by vote of the Louisiana District Board of the Denomination, its official tribunal and governing body.⁵⁶⁴ Joiner sued the board members alleging three claims: defamation, wrongful disfellowship because of procedural irregularities by the board, and that his dismissal from the ministry wrongfully deprived him of his livelihood.⁵⁶⁵

The court of appeals affirmed the dismissal of Joiner's complaint on all counts. As to the defamation claim, the appeals court held that all statements made at the board's disciplinary hearing, as well as publication of the resolution of disfellowship announcing the board's decision, were privileged.⁵⁶⁶ Thus truth or falsity of the communications was irrelevant. Further, the evidence failed to "show that a reasonable trier of fact would find by clear and convincing evidence that the Board or its members acted or spoke with malice."⁵⁶⁷ Noting the first amendment's well known bar to civil court review of ecclesiastical disciplinary proceedings, the court of appeals expressed a suspicion that Joiner's motive in bringing this tort claim was to accomplish indirectly what he could not do directly:

Plaintiff's complaint against the defendant Board members is, in reality, an attempt by plaintiff to appeal the decision of the Board that he is spiritually unfit to continue as a minister in the United Pentecostal Church. . . .

It would be ludicrous to believe that the constitutional principles upheld by the United States Supreme Court in *Milivojeovich* [426 U.S. 696] could be satisfied by allowing this intrusion into the disciplinary proceedings of an ecclesiastical board. To allow defamation suits to be litigated to the fullest extent against members of a religious board who are merely discharging the duty which has been entrusted to them by their church could have a potentially chilling effect on the performance of these duties and could very well inhibit the free communication of important ideas and candid opinions.⁵⁶⁸

As to plaintiff's tort claim protecting business-related interests, the appeals court held that Joiner's "loss of ministerial income must be accepted as a necessary consequence of his dismissal from the ministry."⁵⁶⁹

The extent to which *Serbian Eastern Orthodox v. Milivojeovich*⁵⁷⁰ has constricted tort claims such as defamation, or abrogated them altogether, cannot be

⁵⁶³ *Joiner*, 383 So.2d 101.

⁵⁶⁴ *Id.* at 102-03.

⁵⁶⁵ *Id.* at 104.

⁵⁶⁶ *Id.* at 105-06.

⁵⁶⁷ *Id.* at 107.

⁵⁶⁸ *Id.* 106.

⁵⁶⁹ *Id.* at 107.

⁵⁷⁰ *Milivojeovich*, 426 U.S. 696. See *supra* notes 84-96 and accompanying text.

determined with clarity. What may be said with assurance is that common law torts concerning discipline of clergy must henceforth survive in the shadow of the first amendment. In matters arising out of ecclesiastical office and discipline, the Supreme Court in *Serbian E.* left only the smallest of openings for civil court review:

We have concluded that whether or not there is room for "marginal civil court review" under the narrow rubrics of "fraud" or "collusion" when church tribunals act in bad faith for secular purposes, no "arbitrariness" exception—in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations—is consistent with the constitutional mandate that civil courts are bound to accept the decision of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.⁵⁷¹

If church officials may be sued only for "fraud or collusion," and then only if their "bad faith" motives were fueled by "secular purposes" as opposed to sectarian ambitions—such as covering up embezzlement of church funds or appropriation of church real estate so it can be sold and the proceeds divided for personal use⁵⁷²—then it is not certain that malicious defamation is actionable at all in most instances. Consider, for example, a situation in which one priest lodges false charges against another priest in his diocese. Further assume that the charges are knowingly false, slanderous *per se*, and are brought by the priest because he desires to be selected for a particular advancement and fears that the one he accuses will receive the desired position unless the competition is eliminated. To be sure, the hypothetical actions of our priest are defamatory and brought in "bad faith," yet his purpose was not "secular" gain as *Serbian E.* requires, but to secure a higher sectarian office. Although our priest had achieved ecclesiastical advancement by fraud, and his methods are to be morally condemned, the civil courts most likely would refuse jurisdiction should the whole sordid affair be exposed and the victimized priest seek to recover damages (resulting from not being selected for the advancement) in an action for malicious defamation.

In the recent case of *Hutchison v. Thomas*⁵⁷³ a federal court of appeals refused to review the circumstances of the forced retirement of a Methodist minister. The minister filed his action against four of his superiors alleging that he was expelled by fraudulent, arbitrary, or collusive application of church disciplinary rules, and he set forth claims for defamation, intentional infliction of emotional distress, and breach of contract.⁵⁷⁴ Defendants gave as cause for the minister's retirement an inability to work with congregations to which he was assigned and an inability to get along with church members.

⁵⁷¹ *Milivojevich*, 426 U.S. at 713.

⁵⁷² See *infra* notes 644-54 and accompanying text.

⁵⁷³ *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir.), *cert. denied*, 55 U.S.L.W. 3251 (1986).

⁵⁷⁴ *Id.* at 393.

Citing first amendment cases, the appeals court held that the district court had properly dismissed the complaint. The court rejected the minister's claim that he fell within the exceptions allowing judicial review of ecclesiastical decisions for fraud or collusion.⁵⁷⁵ Assuming there were such exceptions allowing civil court jurisdiction, the court of appeals said that review "is still only allowed for fraud or collusion of the most serious nature undermining the very authority of the decision-making body."⁵⁷⁶ The court also rejected the minister's contention that it could resolve the dispute by application of neutral principles of law. The court noted that the neutral-principles rule had been applied by the Supreme Court only to property disputes, and it should not be "extended to religious controversies in the areas of church government, order and discipline."⁵⁷⁷

While *Hutchison* concerned the retirement of religious officials, the interesting case of *Monahan v. Sims*⁵⁷⁸ involved the initial selection and ordination of clerics. Ms. Evelyn Monahan filed suit against various officials in the Atlanta Diocese of the Episcopal Church and one of the witnesses appearing before an inquiry board, alleging defamation, intentional infliction of emotional distress, and breach of contract or interference with employment. Monahan had achieved the status of postulancy, a probationary office preceeding ordination. She was refused ordination to the priesthood because of reports showing involvement with the occult, an alleged homosexual affair, difficulty in adhering to Anglican dogma, and difficulty in cooperating with male church authority.⁵⁷⁹

The state court of appeals upheld the summary judgment granted by the trial court. First, the church had conducted its inquiry and meetings in a confidential manner, so there was no publication of the allegedly defamatory information.⁵⁸⁰ Second, the granting or denial of ordination is an ecclesiastical matter. The appeals court concluded that "[I]n the absence of improper publication or evidence pointing to fraud or collusion . . . (a factor not supported by any evidence of record), this record presents a pure ecclesiastical matter."⁵⁸¹

⁵⁷⁵ *Id.* at 395.

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.* at 396. Similar to *Hutchison* is the case of *Kaufmann v. Sheehan*, 707 F.2d 355 (8th Cir. 1983). In *Kaufman*, a Roman Catholic priest brought on action against officials in his archdiocese for defamation, conspiracy, and denial of procedural due process. The tort claims were timed barred, and the claim of procedural irregularities could not be reviewed consistent with the first amendment.

Occasionally, religious officials have brought actions in federal court against their church and others alleging constitutional claims and employment discrimination. These actions have also been dismissed citing the first amendment and other reasons barring the claims. *See, e.g., Simpson v. Wells Lamont Corporation*, 494 F.2d 490 (5th Cir. 1974) (removal of pastor from his position and eviction from parsonage); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 3333 (1986) (sex and race discrimination); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972) (sex discrimination).

⁵⁷⁸ *Monahan v. Sims*, 163 Ga. App. 354, 294 S.E.2d 548 (1982).

⁵⁷⁹ *Id.* at 355, 294 S.E.2d at 549-50.

⁵⁸⁰ *Id.* at 358-359, 294 S.E.2d at 551.

⁵⁸¹ *Id.* at 360, 294 S.E.2d at 552.

The minister in *Hutchison* cited *Alberts v. Devine*⁵⁸² as authority for civil court review of retirement decisions by church officials. Without stating that it agreed with the result in *Alberts*, the court in *Hutchison* declined to follow *Alberts* because of the significantly different facts.⁵⁸³ In *Alberts*, a Methodist minister was under the care of a psychiatrist. The minister's immediate superiors in the church sought information from the psychiatrist regarding the minister's fitness to continue in his pastoral responsibilities. Without authorization, the psychiatrist divulged the information. The minister was forced into retirement, allegedly for reasons based in substantial part on the psychiatrist's records. The minister then sued his psychiatrist for breach of confidentiality and his two former superiors in the church for inducing the breach.⁵⁸⁴

When church officials raised religious liberty defenses to the claim against them, the Massachusetts Supreme Court ruled that the first amendment did not preclude imposition of liability for wrongfully inducing the breach of confidentiality held between physician and patient.⁵⁸⁵ Nor did the religion clauses preclude the court from compelling discovery into details of the church proceeding that eventually resulted in the retirement decision.⁵⁸⁶

The state supreme court pointed out that neither the plaintiff's qualifications as a minister nor the propriety of the church's decision to relieve him of his duties were being directly questioned. However, insofar as the defendants claimed that church law required them to seek the confidential information on the plaintiff, the court held that a patient's right of confidentiality as to mental health records outweighed any incidental impact on the church's interest in selecting and supervising its ministers.⁵⁸⁷

Alberts v. Devine is a difficult case, but the Massachusetts Supreme Court probably struck the right balance. The strong societal interest in protecting the confidentiality of the physician-patient relationship is largely collateral to the church's interest in being free of governmental interference in supervising its ministers. If it was desirable, even essential, that the church have psychiatric information on its ministers, it should simply secure the consent of the minister to obtain the psychiatric information. If consent is refused, then clearly the church can impose discipline for his lack of cooperation—even compel retirement on that basis alone. What the church cannot do is leave its usual sphere of operations and violate the rights of others that are largely incidental to its autonomy. Reasonable discovery to explore the causal relationship between the unauthorized

⁵⁸² *Alberts v. Devine*, 479 N.E.2d 113 (Mass.), cert. denied, 106 S. Ct. 546 (1985).

⁵⁸³ *Hutchison*, 789 F.2d at 396.

⁵⁸⁴ *Alberts*, 479 N.E.2d at 116-17.

⁵⁸⁵ *Id.* at 122-23.

⁵⁸⁶ *Id.* at 123-24.

⁵⁸⁷ *Id.* at 122-23.

disclosure and the forced retirement is required to protect the right of physician-patient confidentiality. However, care must be used to prevent wide ranging discovery into all church records and personnel decisions. The first amendment bar to excessive entanglement by government in church affairs precludes plaintiff's counsel from rummaging through church files with impunity.⁵⁸⁸

2. Discipline of Church Members

The first amendment considerations pertaining to the discipline of church members⁵⁸⁹ are in most respects the same as when clerics or other religious officers are reprimanded for misconduct. Because of the absence of the employer-employee relationship, however, the factual content from which these tort claims arise sometimes gives the appearance that these suits are of a different character. The actions presently being filed typically involve a church member (or former member by the time the case is filed) who has been sanctioned by the church.⁵⁹⁰ The causes

⁵⁸⁸ Presently pending are two major lawsuits involving multiple tort claims by pastors disciplined by church superiors. In *Metzgar v. Hendersonville First Assembly of God Church*, No. 2285-C (Tenn. Cir. Ct., Sumner Co. filed Dec. 10, 1984), a pastor and his family has sued church board members, the local church, and various denominational employees and organizations alleging claims of breach of contract, outrageous conduct, defamation, invasion of privacy, and possibly false imprisonment. The lawsuit arises out of charges of fiscal improprieties by the pastor, subsequent criminal charges against him, and a schism within the local congregation.

Roberson, No. 91129 (Cal. Super. Ct., Santa Cruz Co.) involves a claim by a former bishop against church officials and the denomination. He alleges claims for invasion of privacy, breach of fiduciary duty, injurious falsehood, slander, false imprisonment, emotional distress, negligence, negligent infliction of physical harm, interference with prospective business advantage, trespass, conversion, and conspiracy. The matter arises out of a disciplinary action for sexual impropriety of the pastor (a matter he admits) and subsequent incidents after proceedings were instituted leading to excommunication.

⁵⁸⁹ See generally, L. BUZZARD & T. BRANDON, *CHURCH DISCIPLINE AND THE COURTS* (1986); Southard, *Church Discipline: Handle with Care*, CLERGY MALPRACTICE 74 (Malony ed. 1986); R. HAMMAR, *supra* note 474, Chap. 4, D; C. ZOLLMANN, *AMERICAN CIVIL CHURCH LAW* 349-50, 392-94 (1917); Flowers, *Can Churches Discipline Members and Win in Court*, 27 J. OF CHURCH & STATE 483 (1985).

⁵⁹⁰ In addition to the cases discussed in the text, the following lawsuits are pending. In *Brown v. Fairview Church of Christ*, No. 42 77 64 (Cal. Super. Ct., Orange Co. filed Apr. 20, 1984), the plaintiff sued the church, its preacher, and the elders, setting forth counts for libel *per se*, slander *per se*, invasion of privacy, and intentional infliction of emotional distress. The complaint stems from the church's action in "disfellowshipping" the plaintiff for instituting divorce proceedings against her husband and for not attending church. The defendants read a letter to the congregation announcing the expulsion. Plaintiff alleges the letter mislead people into thinking she had committed adultery.

The case of *Kelly*, No. 545117 (Cal. Super. Ct. Santa Clara Co.), was brought against the church, its elders, and the pastor, in a multi-count complaint for professional malpractice, breach of fiduciary duty, emotional distress, negligence, invasion of privacy, interference with contract, and interference with prospective business advantage. Plaintiff had sought help with his marriage and with his acts of adultery from Dr. Donald Phillips, a practicing family counselor. Phillips was also an elder in the church where plaintiff was a member. Plaintiff disclosed confidential and embarrassing details regarding these areas of his life to Dr. Phillips, who allegedly released the information to the church without plaintiff's consent. Subsequently, the church released the information before the congregation in the course of excommunication. The malpractice claim is solely against Dr. Phillips. The trial court

of action are usually for defamation, invasion of privacy, and either intentional or negligent infliction of emotional distress.⁵⁹¹

Before the first amendment was held to be binding on the states, a minority of jurisdictions held that the relationship between an individual church member and the religious society was governed by the law of contracts.⁵⁹² This conception was problematic and widely criticized.⁵⁹³ The predominant judicial view was

[A] person who assumes the position of . . . a member of a church organization voluntarily agreed, impliedly if not expressly, to conform to the canons and rules and to submit to the authority of the church. By becoming a member an individual approves the rules provided by the government of the society and agrees to be governed by its usages and customs. He becomes a member on the condition of continuing or not, as he or his church may determine.⁵⁹⁴

Given the Supreme Court's line of cases from *Watson* to *Kedroff*, *Presbyterian Church*, and finally *Serbian E.*,⁵⁹⁵ there can be little question that this predominant view is now binding by force of the first amendment on all the states.

Although considerable attention by the popular media has been given to pending cases,⁵⁹⁶ it is instructive to look first at some of the older cases. The facts

has denied defendants' motion to dismiss.

An entire family disciplined before the congregation has sued in *Shive v. Adkisson*, No. 84 CV8646 (Colo. Dist. Ct., City & County of Denver filed Sept. 6, 1984). The plaintiffs, husband, wife, and two daughters, sued the pastor and deacons of the First Baptist Church of Pagosa Springs stating counts for slander, libel, invasion of privacy, and outrageous conduct. The complaint alleges that they were denounced before the church as heretics, deceivers, fornicators, and drunkards, and that certain private facts were released. Plaintiffs were all recently killed in an airplane accident. Only the claims for invasion of privacy and outrageous conduct survive their death.

A journal article reports on the case of *Devere Ganges v. New Central Baptist Church*, filed in the Philadelphia Court of Common Pleas. Buie, *The Scarlet Letter Revisited*, 37 CHURCH & STATE 126, 128 (June 1984). Ganges claims that while excommunicating him the pastor and other church officials defamed him by calling him a heathen and comparing him to the devil. Ganges also seeks reinstatement as a member of the church.

Finally, in an unusual disposition of a case whereby plaintiff agreed to dismissal of the matter by paying defendants \$4,500, a settlement was reached in the case of *Murry v. The Church of Christ, Northside*, No. 15,420 (Tex. Dist. Ct., Val Verde Co. filed Sept. 6, 1984). Plaintiff sued the church and several of its officers stating claims for invasion of privacy and intentional infliction of emotional distress. The defendants had read a letter to the congregation stating that plaintiff was being disfellowshipped for adultery. Defendants filed counterclaims. The settlement is reported in *The Lufkin (Texas) Daily News*, Sept. 5, 1985, at 5A.

⁵⁹¹ In one case dissident members expelled from a church sought to bring claims of federal constitutional and civil rights violations against their former church. The complaint was dismissed for first amendment and other reasons. *Nunn v. Black*, 506 F. Supp. 444 (W.D. Va.), *aff'd memo.*, 661 F.2d 925 (4th Cir. 1981), *cert. denied*, 454 U.S. 1146 (1982).

⁵⁹² *W. TORPEY*, *supra* note 551, at 125.

⁵⁹³ *Id.* at 125-26.

⁵⁹⁴ *Id.* at 126 (footnotes omitted).

⁵⁹⁵ See *supra* notes 52-96 and accompanying text.

⁵⁹⁶ See Cleary, *An Affair For the Church?* 6 NAT'L L.J. 6 (1984); Buie, *supra* note 590.

in these century-old opinions are remarkably similar to actions pending today. In actions for libel or slander arising out of disciplinary actions by religious organizations, the universal rule of the common law was to treat all such communications as qualifiedly privileged.⁵⁹⁷ Libel was alleged by the female plaintiff in *Farnsworth v. Storrs*⁵⁹⁸ against the minister who read from the pulpit during a worship service a resolution of excommunication. In pertinent part, the document recited that the plaintiff “clearly violated the seventh commandment,” and subsequently declared that the “church does now as always bear its solemn testimony against the sin of fornication and uncleanness, as an unfruitful work of darkness, eminently dishonorable to the God of purity and love; polluting to the soul of men and fearfully prejudicial to the welfare of society and the world.”⁵⁹⁹ The state supreme court held that the public reading of the resolution was privileged and thus the claim was dismissed. Maintenance of church order and discipline, said the court, were amongst its long recognized powers, including hearing complaints of misconduct and administering punishment if found to be true. Concerning the basis for authority of the church over members, the court was of the view that by voluntarily entering into the church covenant, the member is bound by consent.⁶⁰⁰ As a final ground for reversal, plaintiff pointed to the fact that her excommunication had taken place at a meeting prior to the worship service. Thus, she argued, when the resolution was subsequently read to the congregation, she was no longer a member, and thus not under its jurisdiction. The libel having taken place after her separation from the church, plaintiff submitted that the statement could not be privileged for it was outside the scope of discipline. This too, the court held, misapprehended the purpose and scope of discipline. The entire congregation, not just the church leaders, had cause to hear the fact of excommunication and the reason for it. “One great purpose of an act of church discipline is, that it may have a salutary influence upon the whole religious body,

⁵⁹⁷ In addition to the cases discussed in the text, see *Church of Scientology of California*, 354 F. Supp. 800 (church document concerning expulsion of member is privileged); *Cimijotti*, 219 F. Supp. 621 (communications made to priest by church members seeking sanction against another member is qualifiedly privileged); *Gaillot v. Sauvageau*, 154 So. 2d 515 (La. Ct. App. 1963) (statements by priest to his congregation about heretical teachings of excommunicated member is qualifiedly privileged); *Crosby v. Lee*, 88 Ga. App. 589, 76 S.E.2d 856 (1953) (defamation claim arising out of letter concerning plaintiff circulated by church leaders in course of expulsion proceedings is privileged); *Carter v. Papineau*, 222 Mass. 404, 111 N.E. 358 (1916) (defamation action does not lie for priest's refusal to serve communion to member under church discipline); but cf. *Brewer v. Second Baptist Church*, 32 Cal.2d 791, 197 P.2d 713 (1948) (although communications pursuant to disciplinary action by church were qualifiedly privileged, sufficient evidence was presented such that jury could find actual malice; the case does not discuss the First Amendment questions); *Loeb v. Geronemas*, 66 So. 2d 241 (Fla. 1953) (defamation action against officers of Jewish community center and lodge, statements concerning plaintiff were qualifiedly privileged but not remarks made to general circulation newspapers); *Call v. Larabee*, 60 Iowa 212, 14 N.W. 237 (1882) (same).

⁵⁹⁸ *Farnsworth v. Storrs*, 59 Mass. (5 Cush.) 412 (1850).

⁵⁹⁹ *Id.* at 412-13.

⁶⁰⁰ *Id.* at 413-17.

of which the offender is a member.”⁶⁰¹ Since discipline is for the congregation as well as the offender, public reading of the resolution was within the scope of ecclesiastic discipline and thus privileged.

In *Landis v. Campbell*,⁶⁰² a member of a Presbyterian Church was excommunicated for allegedly having made false and malicious remarks about the pastor. This act of the church judicatory was then read to the local congregation, and copies were recorded in the church’s minute book and shown to the ruling elders. The plaintiff sued the pastor and two elders, who together composed the judicatory, alleging that the charges brought against him before the judicatory were untrue and their publication was libelous.⁶⁰³ In line with earlier precedent, however, the state supreme court held that the basis for church membership was voluntary consent, which entails submission to the acts of its tribunals, that communications in the course of discipline were privileged if not motivated by malice, and that announcement of the excommunication to the congregation and recording in the book of minutes were within the scope of church discipline. Accordingly, judgment was ordered for the church.⁶⁰⁴

To the same effect is the libel action in *Lucas v. Case*,⁶⁰⁵ where the reasons for a member’s expulsion announced to the congregation “were using improper and unchaste language” and other “improper conduct” toward a woman in the church.⁶⁰⁶ Being no evidence of malicious conduct, statements by the pastor and elders were found to be privileged.⁶⁰⁷

In the face of well established precedent like *Farnsworth*, *Landis*, and *Lucas*, the dispositions in two pending cases are surely mistaken — particularly so now

⁶⁰¹ *Id.* at 414. *Accord*, C. ZOLLMANN, *AMERICAN CIVIL CHURCH LAW* 394 (1917).

⁶⁰² *Landis v. Campbell*, 79 Mo. 433, 49 Am. Rep. 239 (1883).

⁶⁰³ *Id.* at 434-36.

⁶⁰⁴ *Id.* at 439-41. The court suggested that any other rule would have adverse results not only for the church, but for the courts:

Actions for libel and slander would crowd the docket of the civil courts, which would, on that theory, be open to the complaint of every man expelled from a church....Every such expulsion involves, to some extent, a charge of moral turpitude or conduct unbecoming a gentleman or lady. *Id.* at 439.

⁶⁰⁵ *Lucas v. Case*, 72 Ky. (9 Bush) 297 (1872).

⁶⁰⁶ *Id.* at 298-99.

⁶⁰⁷ *Id.* at 302-03. Yet another case from the Nineteenth Century, apparently not generally reported, is noted at A. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 534 (1964). In 1822 a Roman Catholic priest in the Diocese of Detroit excommunicated one of his parishioners for divorcing his wife and then remarrying. In the trial court, the man obtained a judgment of \$1,116 against the priest for damages to reputation and business. The judgment was reversed on appeal. Finally, consider *Servatius v. Pichel*, 34 Wis. 292 (1874), where a prosperous landlord excommunicated from the Roman Catholic Church for having used physical force against a priest brought an action for slander. Plaintiff’s damages were that other Catholics refused to lease his buildings or engage in other trade with him. The trial court’s dismissal on the pleadings was reversed because although qualifiedly privileged the complaint alleged the discipline was malicious and “with intent to injure and scandalize the plaintiff.”

that the strictures of the first amendment are binding on the states. In *Bates v. Kingdom Hall of the Congregation*,⁶⁰⁸ a state court of appeals has affirmed in part and reversed in part a trial court's dismissal of a complaint brought by a "disfellowshipped" Jehovah's Witness. The plaintiff's petition against the church and elders alleged that in expelling him from the church, the elders had acted beyond the scope of their ecclesiastical authority and that they had also defamed him. The trial court granted a motion to dismiss the complaint holding it lacked jurisdiction for first amendment reasons.⁶⁰⁹ The appeals court, citing *Serbian E.*, agreed that the claim requesting review of the elders' scope of disciplinary authority within the church should be dismissed.⁶¹⁰ It reversed on the defamation claim, however, on a rationale that misapplies the Supreme Court's admonition to the civil courts not to get involved in the resolution of ecclesiastical questions. The plaintiff alleged that the charges against him brought before the board of elders were inaccurate and slanderous. Given this allegation, which must be taken as admitted in a motion to dismiss, the court of appeals reasoned that:

Although at first appearance the resolution of this matter appears on its face to be subject to the very dangers set forth in *Serbian*, we find that that might not necessarily be the case. Appellant has clearly set forth a legally recognized claim for relief. The claims of privilege as a defense are limited to those privileges which are recognized at law. These plus the other defenses may be determinable without having to resolve ecclesiastical questions. This will require some elements of evidence. Not knowing what, if anything was said, the context in which it was spoken, or the degree of any ecclesiastical aspects thereof, dismissal of the slander claim was premature.⁶¹¹

The first amendment does indeed enjoin civil court resolution of doctrinal disputes. But it commands much more. In disputes over church real estate, the Supreme Court has permitted the application of neutral-principles-of-law to resolve the conflict, while cautioning against becoming embroiled in the interpretation of religious matters.⁶¹² But disputes over control of property are very different from the terms and conditions of church membership and ecclesiastical discipline attendant thereto. Questions over who may join and remain in a religious society go to the very heart of the church's self-understanding and control of its integrity and mission.

*Guinn v. Church of Christ*⁶¹³ is the other recent case where it appears the court has departed from well established principles of both tort and constitutional

⁶⁰⁸ *Bates v. Kingdom Hall of the Congregation*, No. 9510 (Ohio Ct. App. Mar. 6, 1986) (Slip op.)

⁶⁰⁹ *Id.*

⁶¹⁰ *Id.*

⁶¹¹ *Id.*

⁶¹² See *supra* notes 97-107 and accompanying text.

⁶¹³ *Guinn v. Church of Christ*, No. Ct-81-929 (Okla. Dist. Ct., Tulsa Cty. filed Oct. 26, 1981; amended petition filed Nov. 23, 1981). The case has the following complex procedural history: *Guinn v. Church of Christ*, No. CT-81-929 (Okla. Dist. Ct. Tulsa Jan. 7, 1983) (unpublished order) (state trial court refused to dismiss action by church member for invasion of privacy suit arising out of

law. In an amended petition, Marian Guinn filed suit against her former church and its leaders alleging claims for intentional infliction of emotional distress and two counts for invasion of privacy (public disclosure of private facts and intrusion upon seclusion).⁶¹⁴ Guinn was expelled from the church for the offenses of fornication, dishonesty, and drunkenness. The defendants announced the excommunication before the church congregation and sent copies of the action to other nearby churches of the same denomination.

When privately confronted by the elders concerning the charges, Guinn admitted the fornication but refused to refrain from such acts in the future. When she was informed of the leaders' intent to announce the expulsion to the assembled church, Guinn sought to resign her membership hoping to prevent further embarrassment. The leaders proceeded with the disciplinary process, including informing the congregation of their action.⁶¹⁵

In a much publicized trial, the jury awarded Guinn \$827,000 in actual and punitive damages. This amount was reduced by the trial court, and judgment was entered in the amount of \$390,000. Defendants have appealed, and the case is pending before the Oklahoma Supreme Court.

As with *Bates*, the *Guinn* case should have been summarily dismissed. If religious liberty means anything, it must allow for a church to expel its members for reasons that others regard as arbitrary, foolish, prudish, or "no business of the church." The autonomy of religious societies as to matters of membership requires that actions such as *Bates* and *Guinn* be qualifiedly privileged in the law of torts. This privilege can be overcome only upon clear and convincing proof of either fraud motivated by a wholly secular purpose⁶¹⁶ or malicious acts that cause injury beyond the reasonable bounds of any religious interest of the church in its relationship to its members.⁶¹⁷ Thus, in *Guinn*, the church had a religious interest in announcing the reasons for the expulsion to its congregation, even after Guinn unilaterally resigned. As stated in *Farnsworth*, "[o]ne great purpose of an act of church discipline is, that it may have a salutary influence upon the whole religious body."⁶¹⁸ Of course, Guinn has a free exercise right to resign from a

church disciplinary proceeding), *appeal denied*, No. 59,623 (Okla. Sup. Ct. Mar. 1, 1983) (unpublished order), *cert. denied sub nom.*, *Church of Christ v. Graham*, 104 S. Ct. 85 (1983), *on remand*, No. CT-81-929 (Okla. Dist. Ct., Tulsa, Mar. 15, 1984) (\$390,000 actual and punitive damages awarded), *appeal docketed*, No. 62,154 (Okla. Sup. Ct. Apr. 16, 1984). For detailed discussion of the case, see Note, *When Fundamental Rights Collide: Guinn v. Collinsville Church of Christ*, 21 TULSA L. REV. 157 (1985).

⁶¹⁴ See RESTATEMENT (SECOND) OF TORTS §§ 652A-652I (1977).

⁶¹⁵ Note, *supra* note 613, at 158-61.

⁶¹⁶ See *infra* text accompanying notes 570-72. *Accord*, *First Baptist Church v. Ohio*, 591 F. Supp. 676, 683 (S.D. Ohio 1983).

⁶¹⁷ See *infra* text accompanying notes 626-39.

⁶¹⁸ See *supra* text accompanying notes 598-601. See, e.g., *Brady v. Reiner*, 198 S.E.2d 812, 845 (W. Va. 1973) (member may separate from church at anytime but may not take with him property

church at any time and for any reason. But the church also has rights, including the right to proceed with its discipline.

One can easily contemplate hypothetical situations that would overcome the limited privilege. For example, should the elders of a church discipline a member who is also the mayor of the city, publically giving as the reasons therefore scandalous matter, all with the purpose of spoiling the mayor's chance for re-election to public office, the privilege would not provide a defense. Such allegations, if proved to the trier of fact in our hypothetical, have as their object a purpose outside the church's interest in its institutional integrity. But nothing alleged in *Bates* or *Guinn* remotely qualify for such an exception.

"Shunning" is a type of discipline practiced by some Anabaptists that entails having nothing to do with an expelled member, not religiously, socially, or in commercial affairs. Perhaps most egregious, even spouse and children are to have no familial relations with the one disciplined under pain that they too will be shunned. *Kauffman v. Plank*⁶¹⁹ concerned an act of shunning by the Amish Mennonite Church, but because the prayer for relief was not for damages but reinstatement to membership in the church, the court said it could not provide the remedy requested.⁶²⁰ Most recently in *Paul v. Watchtower Bible Society*,⁶²¹ a federal district court refused relief to a former Jehovah's Witness who complained that she was being shunned and called a fornicator by members of the church. Solicitous of the need for church-state separation, the court said that civil tribunals cannot interfere in church matters that pose no threat to public safety or welfare. Finally, in *Bear v. Reformed Mennonite Church*,⁶²² a state supreme court reversed a trial court's dismissal and ordered a trial in a shunning case. Insofar as the complaint sought damages, the court held that shunning may be an excessive interference with matters of compelling state interest, such as maintenance of marital and family relationships.⁶²³ On remand, claims of alienation of affections

previously given to the church); *Katz v. Singerman*, 241 La. 103, 134, 127 So. 2d 515, 516 (1961) (personal liberty of individual members of synagogue not affected by change in religious practice for they may carry their membership elsewhere); *Fuchs v. Meisel*, 102 Mich. 357, 373, 60 N.W. 773, 778 (1894) (dissidents possess right to withdraw from church with or without reason, but cannot take with them church property).

⁶¹⁹ *Kauffman v. Plank*, 214 Ill. App. 306 (1919).

⁶²⁰ *Id.* at 310.

⁶²¹ *Paul v. Watchtower Bible Soc'y*, No. 84-826 (E.D. Wash. June 18, 1985), *appeal docketed*, No. 85-4012 (9th Cir. 1985). See *Seattle Times*, Mar. 10, 1986, at B12.

⁶²² *Bear*, 462 Pa. 330, 341 A.2d 105.

⁶²³ *Id.* at 107. See *Lide v. Miller*, 573 S.W.2d 614 (Tex. Civ. App. 1978), involving a defamation action by a dentist who was publically disciplined by a church. The appeals court sustained a summary dismissal of the defamation claim against church elders, but reversed and remanded for trial a claim for tortious interference with business relations. Similar to *Lide* is *Morassee v. Brochu*, 151 Mass. 567, 25 N.E. 74 (1890), where a priest, in excommunicating a member for remarriage following divorce, also said the offense should disqualify the member from employment as a physician. As the priest's words were found to be spoken with the purpose of injuring plaintiff as a physician, a jury verdict for plaintiff was sustained.

and tortious interference with business relations would be allowed. The result in *Bear* is not only at odds with several cases elsewhere, but is also in direct conflict with Anabaptist teaching and practice dating back to the Sixteenth Century.⁶²⁴

C. Tort Claims Arising Outside the Course of Counseling and Discipline

Communications said to be defamatory take place outside the scope of church discipline and occasionally have resulted in claims against a church or the clergy. The allegedly slanderous statements or libelous publications fit one of two patterns: either the communication was directed against a church member or religious officer,⁶²⁵ or the injured party is wholly unconnected with the church.⁶²⁶

⁶²⁴ See *supra* text accompanying notes 352-355. A related case by the same plaintiff, Robert L. Bear, demonstrates the futility of civil courts involving themselves in church discipline. In a civil rights claim filed in federal district court by Bear against the same parties, the judge dismissed his complaint citing the first amendment. *Bear v. Shugart*, No. 85-1886 (M.D. Pa. Feb. 27, 1986).

⁶²⁵ In addition to the cases discussed in the text, consider the following decisions. Because they were decided well before the first amendment was held binding on the states, they do not discuss the religion clauses. In *Hellstern v. Katzer*, 103 Wis. 391, 79 N.W. 429 (1899), a priest was permitted to bring a slander action against an archbishop in his church for remarks made about him from the pulpit during a worship service. The slanderous remarks were found not privileged because the archbishop had no power to remove the priest from office and thus the utterances were not in the course of church discipline. *Ritchie v. Widdemer*, 59 N.J.L. 290, 35 A. 825 (1896), involved an action for slander by one minister against another minister of the same denomination. The remarks of defendant were not qualifiedly privileged when made before a congregation of the church that had no authority over a canonical offense pending against the plaintiff. In *Shurtleff v. Parker*, 130 Mass. 293 (1881), a former minister wrote a libelous letter to an association of ministers to which he did not belong, about the plaintiff who was an active minister and association member. The publication was held not privileged because a former minister stood in the same position as the general public concerning the plaintiff's qualifications as a minister.

Finally, a news story reports on a recent slander action brought by Ms. Rita Gilbert against the pastor of the Mountainview Baptist Church. Gilbert began attending services at the church with a younger man. In her suit she alleged that derogatory references were made from the pulpit to her and her younger male attendant during worship services. The case was settled for \$250. *Spartenberg (S.C.) Herald-J.*, Feb. 4, 1986, at 4.

⁶²⁶ In addition to the cases discussed in the text, consider the following. *Church of Scientology v. Blackman*, 446 So. 2d 190 (Fla. Dist. Ct. App. 1984), involves a psychiatrist's claim of liability against church members said to arise from placards used in a demonstration outside of his office. The signs contained derogatory remarks about Dr. Blackman and his use of electric shock treatments in therapy. On interlocutory appeal, the court held that the church was not vicariously liable for the alleged defamatory activities of a co-defendant who had organized the demonstration. Thus the church was dismissed.

Consent judgments were entered concurrently in the cases of *Harris v. Tomczak*, No. CIV-S-80-206-LKK (E.D. Cal. Sept. 6, 1983), and *Harris v. Olympia Broadcasters, Inc.*, No. 287743 (Cal. Super. Ct., Los Angeles Co. Aug. 30, 1983), awarding \$150,000 in damages to Mr. Thomas A. Harris on his claims for defamation. The judgments are against several parachurch ministries and their officers who made remarks over the radio that Harris' book *I'M OK—You'RE OK* was an example of declining morality and that Harris had committed suicide.

In *Gallagher v. Grossman*, No. 214331 (Minn. Dist. Ct., St. Louis Co. filed Mar. 16, 1984), two local women brought a libel suit against a pastor and his church. The complaint alleges that in

In claims by parties outside the church, the religion clauses do not give the church as defendant any special standing beyond that enjoyed by everyone else pursuant to the free speech and free press clauses. Thus, if the communication alleged to be defamatory was directed at a public figure and addressed a matter of public concern, the Supreme Court has varied the standard of care, shifted the burden of proof, and increased the burden of persuasion in ways that favor defendants.⁶²⁷ *Chodos v. Rader*⁶²⁸ is demonstrative of the manner in which courts approach these cases. Hillel Chodos was a special deputy attorney general for California in the case of *California v. Worldwide Church of God*.⁶²⁹ He brought this action for libel, slander, and defamation of character against the Worldwide Church of God and various church officers. In the course of earlier litigation involving a state takeover of the Worldwide Church of God, church officials placed an advertisement in the *Los Angeles Times* criticizing Chodos' behavior and appeared in a television script in which Chodos was mentioned unfavorably. Chodos claimed these expressions were defamatory.

The trial court dismissed Chodos' complaint and denied leave to amend his pleadings. As a special deputy attorney general in a widely publicized case, Chodos was both a public official and public figure subject to critical observation and comment. The court held that Chodos did not, and could not allege clear and convincing evidence that the church officers had published the statements with knowledge of their falsity or in reckless disregard for the truth.

Although the older cases do not, of course, discuss the first amendment, they do regard as quasi-privileged all communications within the church critiquing the qualifications of clergy and church members. Accordingly, in *Pendleton v. Hawk-*

a letter to the editor of a local newspaper the pastor questioned the women's Christian character, reputation, and mental stability. The pastor's letter was responding to one written by the women who had criticized a school board policy for determining suitability of books for the school library.

⁶²⁷ See *supra* notes 197-199 and accompanying text. See also Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749 (1985).

⁶²⁸ *Chodos v. Rader*, No. C. 353329 (Cal. Super. Ct., Los Angeles Co. Jan. 5, 1982).

⁶²⁹ *World Wide Church of God Inc. v. Superior Court*, No. C 267 607 (Cal. Super. Ct., filed Jan. 2, 1979), *cert. denied*, 444 U.S. 883 (1979), *cert. denied*, 446 U.S. 987 (1980). The case concerned an incident where the California Attorney General took over the entire operations of the Worldwide Church of God based on allegations of fiscal irregularities lodged by disgruntled church officials. The Attorney General asserted authority based upon the state's interest in charitable trusts, which the Attorney General maintained was the legal status of a church, thus permitting the use of the provisional remedy of receivership to investigate internal fraud. Eventually, the legislature passed a law denying the authority to institute such actions against religious bodies. Cal. Corp. Code § 230 (West 1983). See Whelan, "Who Owns the Churches?," *Government Intervention in Religious Affairs* 57 (Kelley ed. 1982); Jackson, *Socialized Religion: California's Public Trust Theory*, 16 VAL. U.L. REV. 185 (1981); Worthing, *The State Takes Over A Church*, 446 THE ANNALS 136 (1979); Note, *Government Protection of Church Assets From Fiscal Abuse: The Constitutionality of Attorney General Enforcement Under the Religion Clauses of the First Amendment*, 53 S. CAL. L. REV. 1277 (1980); Note, *Receivers, Churches and Nonprofit Corporations: A First Amendment Analysis*, 56 IND. L.J. 175 (1980).

ins,⁶³⁰ a church deacon had made inquiries of a clerk within the denomination concerning the qualifications of a pastor. Upon receipt of the clerk's letter, the deacon showed it to other deacons and members of the church. The pastor sued the deacon alleging publication of the letter the contents of which were libelous.⁶³¹ The appeals court granted defendant a new trial on the basis that the jury should have been instructed that the publication was qualifiedly privileged. If defendant's actions were not malicious, that is if not done to harm his pastor, but in furtherance of the deacon's responsibilities for management and oversight of the church, he cannot be liable.⁶³²

Religious organizations that are not a church, but nonetheless are such an integral part of a church as to be indistinguishable from it, are also protected by the first amendment. In the unusual case of *Madsen v. Erwin*,⁶³³ a news reporter discharged from the *Christian Science Monitor* for homosexuality filed suit in a multi-count complaint for wrongful discharge, breach of contract, employment discrimination on the basis of sexual preference, and the torts of defamation, interference with advantageous relations, interference with employment contract, invasion of privacy, and intentional infliction of emotional distress.⁶³⁴ Although it may come as a surprise to some of its subscribers, it is well established in Massachusetts law that the *Monitor* is a religious organ of the First Church of Christ, Scientist. Thus, Madsen was an employee of the church.⁶³⁵ Homosexuality is against church doctrine, and Madsen was fired when she admitted she was a lesbian and refused to seek "healing" as to that status. The trial court had denied the *Monitor's* motion for summary judgment, but permitted an interlocutory appeal.⁶³⁶

The state supreme court affirmed in part and reversed in part, and remanded the cause for further proceedings. The appeals court said that the relationship between Madsen and the *Monitor* "can only be construed as a religious one."⁶³⁷ Moreover, because homosexuality was admittedly contrary to church doctrine, the first amendment required that there be no judicial interference in the church-employee relationship. Accordingly, those claims which would regulate the church-employee relationship were ordered dismissed.⁶³⁸ However, on remand Madsen would be permitted to replead her several tort theories. Although the *Monitor*

⁶³⁰ *Pendleton v. Hawkins*, 11 App. Div. 602, 42 N.Y.S. 626 (1896).

⁶³¹ *Id.* at 604, 42 N.Y.S. at 627.

⁶³² *Id.* at 607, 42 N.Y.S. at 629-30. *Cf.* *Edmondson v. Church of God, No. 85-151-II* (Tenn. Ct. App. May 16, 1986) (upholding \$110,000 defamation award in claim by member against church and its general overseer).

⁶³³ *Madsen v. Erwin*, 481 N.E.2d 1160 (Mass. 1985).

⁶³⁴ *Id.* at 1161.

⁶³⁵ *Id.* at 1163-64.

⁶³⁶ *Id.* at 1161.

⁶³⁷ *Id.* at 1165.

⁶³⁸ *Id.* at 1164-66.

may lawfully discharge Madsen, the court suggests that a religious organization may not fire Madsen in a manner that commits tortious harm such as public disclosure of private facts about her.

Under the banner of the First Amendment provisions on religion, a clergyman may not with impunity defame a person, intentionally inflict serious emotional harm on a parishioner, or commit other torts. . . . We recognize that the defendant may be able to interpose defenses or qualified privileges, but these are generally not raised by motion to dismiss. . . .⁶³⁹

The lesson of *Madsen v. Erwin* fairly balances the competing interests. The employee-employer relationship of religious organizations is not to be interfered with by the state, thus permitting employees to be selected, disciplined, or discharged for reasons the church deems proper. On the other hand, in the course of supervising employees, the church is well advised to act with circumspection so as to confine the impact of its discipline to satisfying those purposes within the scope of its religious interests. Injury to disciplined employees that unreasonably goes beyond the ambit of the church's interest in doctrinal integrity and controlling its own internal operations, may cause tortious harm for which the church is answerable.

D. Religious Fraud

Fraud is a criminal offense, and the concept is found throughout the common law having its place in the jurisprudence of contracts, property, agency, trusts and estates. The law of torts defines fraudulent misrepresentation (sometimes called deceit) as follows:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.⁶⁴⁰

In a criminal prosecution for mail fraud, the Supreme Court in *United States v. Ballard*⁶⁴¹ established the first amendment parameters for the permissible regulation and punishment of religious fraud. A person can never be put on trial for holding particular religious tenets, nor can an individual be required to prove in a court of law the objective truth of those same beliefs. Though one's sincerity in professing certain religious propositions may be tested by the trier of fact, the truth of what one believes may not be scrutinized in civil court.⁶⁴² *Ballard* concerned a mail fraud conviction of Guy and Edna Ballard and their son. The Ballards founded a religious movement they called the "I Am." By supernatural

⁶³⁹ *Id.* at 1167.

⁶⁴⁰ RESTATEMENT (SECOND) OF TORTS § 525 (1977). This section is to be read in conjunction with §§ 526-49.

⁶⁴¹ *Ballard*, 322 U.S. 78 (1944). See *supra* notes 175-180 and accompanying text.

⁶⁴² *Id.* at 84-88.

powers, the Ballards claimed that they could heal persons afflicted with serious diseases. The United States mails were utilized to convey these representations and to solicit and collect funds.

Apart from lawsuits against new religious movements,⁶⁴³ apparently there are no generally reported cases of tort claims alleging fraudulent misrepresentation filed against churches or their religious officers. There are, however, a few cases charging fraud in the acquisition of control over church funds or real estate.⁶⁴⁴ For example, where certain members of a church society secretly altered the legal title of church property with the intention of acquiring ownership, the civil courts have intervened to prevent perpetration of a fraud.⁶⁴⁵ Although the question of church membership and expulsion therefrom are not matters over which courts will take jurisdiction, a fraudulent scheme to excommunicate several members of a church so as to gain control of church assets and divert them to personal use, will not preclude equitable jurisdiction to prevent the fraud.⁶⁴⁶

*Hendryx v. Peoples United Church*⁶⁴⁷ is illustrative of this type of case where the courts refuse to let the first amendment be used as a cloak for concealing fraud that is not even arguably in furtherance of a religious purpose. Action was brought by a few individuals on behalf of themselves and other members of a church to cancel a deed, for the appointment of a receiver of the church's property, and for an accounting. Plaintiffs' petition charged the pastor and other members with a fraudulent scheme to gain possession of church property and to convert it to their own use and benefit. At the beginning of trial, the defendants challenged the plaintiffs' standing to sue because they were no longer members of the church, and were not members when the petition was first filed. Uncontroverted evidence was introduced showing that plaintiffs had been expelled from membership. The plaintiffs denied receiving notice or a hearing on their expulsion, nor had any misconduct occurred that would be grounds for their ouster. The rules of the church were examined and they permitted expulsion from membership without notice or hearing, and without proof of misconduct or other cause.⁶⁴⁸ Accordingly, the trial court dismissed because plaintiffs lacked capacity to sue.

The state supreme court reversed and remanded the cause for trial. The appeals court conceded the many cases holding that church membership and ex-

⁶⁴³ See *infra* note 655-675.

⁶⁴⁴ See generally Taylor, *Diversion of Church Funds to Personal Use: State, Federal and Private Sanctions*, 73 J. CRIM. L. & CRIMINOLOGY 1204 (1982); Oaks, *Trust Doctrines in Church Controversies*, 1981 B.Y.U.L. REV. 805.

⁶⁴⁵ See *Bomar v. Mt. Olive Missionary Baptist Church*, 92 Cal. App. 618, 268 P. 665 (1928) (suit by trustees of unincorporated religious association to compel reconveyance of property obtained after secret incorporation by minority members).

⁶⁴⁶ See *Bouldin*, 82 U.S. (15 Wall.) 131, *supra* notes 65-70 and accompanying text; but cf. *Thomas*, 224 Ky. 307, 6 S.W.2d 255 (1928) (if congregation has irregularly removed officers, excluded members, or diverted funds, correction of such abuses rests solely with the church membership).

⁶⁴⁷ *Hendryx v. People's United Church*, 42 Wash. 336, 84 P. 1123 (1906).

⁶⁴⁸ *Id.* at 337-39, 84 P. at 1124.

pulsion were ecclesiastical matters, and that the civil courts must not reexamine or inquire into the motives that actuated the decisions of the highest tribunal of a religious body.⁶⁴⁹ But the cases requiring due deference to the adjudications of church bodies, did not prevent equitable jurisdiction in instances of alleged fraud where "there is no ecclesiastical question involved."⁶⁵⁰

[T]he bald question here is, can a man or set of men, or a majority of the church organization, by chicanery, deceit and fraud, divert the property of a church organization to a purpose entirely foreign to the purposes of the organization, for their own selfish benefit, whether by the expulsion of members or in any other fraudulent manner? Neither the law nor public policy will sustain such a rule.⁶⁵¹

The facts pled in *Hendryx* of expelling members who opposed the fraudulent scheme, if true, undermined the entire authority structure of the church.⁶⁵² Thus, the state supreme court was wholly justified in assuming jurisdiction. This is the very type of "fraud or collusion" motivated by "secular purposes" that the Supreme Court in *Serbian E.* held open for civil court review.⁶⁵³ Care must be taken, however, that bald accusations of "fraud or collusion" not become a ready excuse for breaking down the church doors. Frauds which go to matters that are "arguably religious," are protected by the rule in *Ballard*. As Justice Jackson said in *Ballard*, courts should not refrain from punishing fraud except when it comes to matters of religious "faith or experience."⁶⁵⁴

E. Alleged "Mind Control" and New Religious Movements

The difficulty of honoring the institutional integrity of religious organizations and at the same time recognizing the socially destructive consequence to other cherished values such as parent-child relationships, is posed by the proliferation of recent tort litigation involving new religious movements.⁶⁵⁵ Some of these emerging groups are said to have intertwined ostensibly religious teaching with sophisticated but wholly fraudulent techniques of recruitment, indoctrination, and ultimately "brain washing." New adherents are employed in the solicitation of money for religious leaders in return for communal-like living arrangements and

⁶⁴⁹ *Id.* at 344-45, 84 P. at 1127.

⁶⁵⁰ *Id.* at 345, 84 P. at 1127.

⁶⁵¹ *Id.* at 346, 84 P. at 1127.

⁶⁵² *Accord*, *Hutchison v. Thomas*, 789 F.2d 392, 395 (6th Cir. 1986) ("Assuming, without deciding, that review is allowed for fraud or collusion, it is still only allowed for fraud or collusion of the most serious nature undermining the very authority of the decision-making body.").

⁶⁵³ See *supra* notes 570-572.

⁶⁵⁴ *Ballard*, 322 U.S. at 95 (Jackson, J., dissenting) (discussed *supra* notes 175-180).

⁶⁵⁵ See generally Delgado, *When Religious Exercise Is Not Free: Deprogramming and the Constitutional Status of Coercively Induced Belief*, 37 VAND. L. REV. 1071 (1984); Heins, 'Other People's Faith': *The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L. Q. 153 (1981); Robbins & Anthony, *Cults, Brainwashing and Counter-Subversion*, 446 THE ANNALS 78 (1979); Note, *Religious Deprogramming: A Solution Through Judicially Approved Guardians*, 7 NOVA L.J. 383 (1983).

total immersion into the new order. It is often young people, moreover, who are most attracted to these groups, and their parents have in turn aligned themselves in opposition to the sect.⁶⁵⁶ Litigation most typically comes when a former member, having left the new religious movement, files suit alleging fraud, emotional distress, invasion of privacy, or other injury.⁶⁵⁷

Although the authorities are still divided as to how they should balance religious liberty with other societal concerns, the rule that is emerging from the cases permits these tort claims only in three limited instances: when there has been force or the threat of force, intentional outrageous conduct, or fraud as to purely secular representations. The following discussion is organized around these points.⁶⁵⁸

Violence, force, or threats of physical force by religious groups receive no protection by the first amendment. Thus, one court has said that conduct by agents of a church under a doctrinal directive called "Fair Game" were actionable.⁶⁵⁹ Pursuant to this doctrine a former member of the church received "slanderous telephone calls from her neighbors and employer, physical threats, and [was] assault[ed] with an automobile," all with the purpose of preventing her from pursuing legal rights.⁶⁶⁰ The same plaintiff alleged that at one time "she

⁶⁵⁶ In cases in which the church is not a party, young people who have joined new religious movements have sued their parents and others who have taken drastic action to "deprogram" them. See e.g., *Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied sub. nom.*, *Mandelkorn v. Ward*, 455 U.S. 907 (1982); *Peterson v. Sorlein*, 299 N.W.2d 123 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981). In order to discourage suits against "deprogrammers," one individual has in turn sued a church for malicious prosecution and abuse of process. *Alexander v. Unification Church*, 634 F.2d 673 (2d Cir. 1980).

⁶⁵⁷ In addition to cases discussed in this section, the following unreported matters are pending. *Bredberg v. Long*, No. 4-82-962 (D. Minn. Dec. 31, 1983), involves a tort claim for fraudulent misrepresentation and violation of federal wage and hour laws brought by two former members of a sect called Realife Ranch. In this interim ruling, the court denied Realife's motion to dismiss for lack of personal jurisdiction and improper venue.

In the case of *Oleson v. Faith Assembly*, No. F-8355 (N.D. Ind. filed Feb. 8, 1983), plaintiffs, a husband, wife and minor child, have filed a multi-count complaint against Faith Assembly and its leaders. The controversial sect received considerable media attention because it teaches avoidance of medical and other health care professionals. Plaintiffs allege mental, physical, and emotional injuries as a result of wrongful counseling and neglect to seek treatment of medical ailments.

⁶⁵⁸ The law of gifts, estates and trusts has long policed the relationship between clergy and parishioner, permitting the revocation of property transfers brought about by undue influence or fraudulent misrepresentation. The long history of such causes of action, demonstrates that they can exist alongside concerns of religious liberty without serious first amendment problems. See, e.g., *Ambassador College v. Geotzke*, 244 Ga. 322, 260 S.E.2d 27 (1979), *cert. denied*, 444 U.S. 1079 (1980); *Ambassador College v. Geotzke*, 675 F.2d 662 (5th Cir. 1982) (related case), *cert. denied*, 459 U.S. 862 (1982); *Ambassador College v. McElroy*, 100 Wis. 2d 750, 308 N.W.2d 417 (Ct. App. 1980); *Nelson v. Dodge*, 76 R.I. 1, 68 A.2d 51 (1949); *Brown v. Father Divine*, 163 Misc. 796, 298 N.Y.S. 642 (1937), *aff'd*, 255 App. Div. 671, 4 N.Y.S.2d 989 (1938).

⁶⁵⁹ *Van Schaick*, 535 F. Supp. 1125 at 1142.

⁶⁶⁰ *Id.* Cf. *Allard v. Church of Scientology of California*, 58 Cal. App. 3d 439, 129 Cal. Rptr. 797 (1976), *cert. denied*, 429 U.S. 1091 (1977) (allowing malicious prosecution claim by former member against sect).

was locked in a furnitureless room for a period of two weeks against her will at the offices" of the church,⁶⁶¹ which if true would constitute false imprisonment. A federal district court said that the first amendment does not immunize a religious society from claims of involuntary servitude or forced peonage.⁶⁶² However, the pleading failed to state facts sufficient to sustain these claims of tortious activity. In order to state a claim for false imprisonment, the confinement must be accomplished by physical restraint, force, or fear of force on the part of the victim. Thus, allegations that a religious organization employed "mind control" techniques and threats of divine retribution to overcome one's free will were insufficient to state a cause of action.⁶⁶³

The elements comprising the tort of intentional infliction of emotional distress (also called "outrageous conduct") are extreme or outrageous conduct, an intention to cause emotional distress or reckless disregard of the probability of doing so, that the plaintiff actually suffered severe emotional distress, and a showing that defendant's conduct was the cause of the injury.⁶⁶⁴ "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."⁶⁶⁵

A former member of the International Society for Krishna Consciousness sued its leaders alleging that they acted outrageously toward her. As a 15-year old runaway, plaintiff was recruited to join the Hare Krishna movement. Although her parents were desperately searching for her, and this was allegedly known to the sect's leaders, defendants kept that knowledge from plaintiff and moved her about the country so she would remain hidden from her parents and thus could not consider returning to them. The jury apparently agreed that the allegations were true and that the conduct was outrageous, as a verdict was returned for \$32.6 million on the tort and related claims.⁶⁶⁶

The former adult member of another sect was only partially successful on her claim of outrageous action. A court said that church exhortations to sever ties with her family, secure a divorce, and to depend solely on the church for emotional support was not outrageous conduct. "They are similar to the demands for single-minded loyalty and purpose that have characterized numerous religions,

⁶⁶¹ *Van Schaick*, 535 F. Supp. at 1131-32.

⁶⁶² *Turner v. Unification Church*, 473 F. Supp. 367, 371-72 (D.R.I. 1978), *aff'd*, 602 F.2d 458 (1st Cir. 1979). The court also dismissed claims under federal civil rights acts, the thirteenth amendment, various federal criminal statutes, and a claim for quantum meruit.

⁶⁶³ *Molko v. Holy Spirit Ass'n for Unification of World Christianity*, 179 Cal. App. 3d 450, 224 Cal. Rptr. 817, 831-32, *rev. granted* 228 Cal. Rptr. 159 (Cal. 1986).

⁶⁶⁴ RESTATEMENT (SECOND) OF TORTS § 46 (1965); W. PROSSER & W. KEETON, *supra* note 477, § 12.

⁶⁶⁵ RESTATEMENT (SECOND) OF TORTS § 46, comment d (1965).

⁶⁶⁶ *George*, No. 27-75-65 (Cal. Super. Ct., Orange Co.) Plaintiff also claimed for libel, false imprisonment, and invasion of privacy. Damages were later reduced to \$9.7 million. Part of the trial is reported in Weir, *An Ex-Krishna Sues the Sect*, 5 NAT'L L.J. 6 (June 6, 1983).

political, military and social movements over the ages."⁶⁶⁷ However, allegations that the church conducted a policy or practice of harassing members who sought to leave the sect, and that in accordance with such a directive they made slanderous telephone calls to her neighbors and employer, made threats of bodily harm, and assaulted her with an automobile were sufficient to plead intentional infliction of emotional distress.⁶⁶⁸

In a similar case, the administrator of the estate of his son (the boy having committed suicide), filed an action against the Unification Church in which his son was a member. The court refused to dismiss the complaint prior to trial, holding that the plaintiff stated a claim for intentional emotional distress on behalf of his son. Plaintiff alleged that his son was emotionally or mentally disturbed before he joined the church, and that this became known to its members. Nonetheless, the church subjected his son to "brainwashing" through "heavy and protracted exercises, intense fasting from food and beverages, a program of chanting and related activities," all resulting in an emotional breakdown. Because decedent was alleged to be "gravely disabled" due to mental illness, and that this was known to the church, the pleading stated a claim of outrageous conduct.⁶⁶⁹

By contrast a state court of appeals dismissed claims of emotional distress brought by three former members of the Unification Church. The plaintiffs charged that recruiters for the church told plaintiffs that they were part of the Creative Community Project, an organization with no religious affiliation. They learned of the tie between the project and the church after two weeks at a rural retreat. Although the three admitted they still joined the church after learning of the project's true identity, plaintiffs said they fell under the sway of mind-control techniques such that they could no longer exercise free will. The appeals court ruled that threats of divine retribution and social ostracism if one leaves a church were "neither so indecent nor so beyond the limits of social toleration" as to be outrageous conduct sufficient in law.⁶⁷⁰

Finally, concerning tort claims for fraudulent misrepresentation, the courts have been mindful of *United States v. Ballard* which requires that the judicial system never place in issue the truth or falsity of one's bona fide religious beliefs. Since fraud requires proof that defendant made a statement knowing it to be false, where the statement is religious in nature, *Ballard* prohibits placing its falseness in issue. The former members of new religious movements have sought to

⁶⁶⁷ *Van Schaick*, 535 F. Supp. at 1139.

⁶⁶⁸ *Id.* at 1141-42.

⁶⁶⁹ *Meroni v. Holy Spirit Ass'n for Unification of World Christianity*, 125 Misc. 2d 1061, 480 N.Y.S.2d 706 (1984), *rev'd*, 506 N.Y.S.2d 174 (App. Div. 1986).

⁶⁷⁰ *Molko*, 224 Cal. Rptr. 817, 830-31. For additional opinions dismissing claims of intentional infliction of emotional distress, see *Lewis v. Holy Spirit Ass'n for Unification of World Christianity*, 589 F.Supp. 10 (D. Mass. 1983); *Christofferson*, 644 P.2d at 590-93; *Orlando v. Alamo Foundation*, 646 F.2d 1288 (8th Cir. 1981); *cf. Schupp v. Unification Church*, 435 F. Supp. 603 (D. Vt.), *aff'd*, 573 F.2d 1295 (2nd Cir. 1977) (claim of alienation of child's affections for parents).

work around the holding in *Ballard* by sifting out the representations that are "wholly secular" from those that are "arguably religious," and founding their claim of fraud on only the secular.⁶⁷¹ Thus, a former member of a sect was permitted to sue for alleged misrepresentations that she "would receive benefits, including training, room and board, and various work and research opportunities" from the church.⁶⁷²

Another court held that all claims of fraud and deceit by former members should be dismissed. The plaintiffs alleged that recruiters for the church had invited them to a rural retreat by falsely representing that the organization had purposes other than religious. Because the ex-members remained with the movement once they learned of its religious purpose, however, the evidence of fraud was insufficient.⁶⁷³ As to the plaintiffs' contentions that they lost their free will to leave the church because of "brainwashing" techniques, the court responded that so long as force or threat of force was not used it could not put on trial the church's means of indoctrination.⁶⁷⁴ The "beguiling and very intensive recruiting methods. . . which appear primarily directed at those young people who are emotionally impressionable and vulnerable, seem objectionable to us,"⁶⁷⁵ said the court, but added that the first amendment prohibits judicial inquiry into the spiritual nature of its hold on its members.

V. CONCLUSION

America is in an age in which several socioreligious developments have brought intense pressure on the always difficult relationship between church and state. First, it is commonplace to say society has been desacralized. America may not be a wholly secular society, but massive secularization has taken place, even in

⁶⁷¹ *Christofferson*, 644 P.2d at 601-05; *Van Schaick*, 535 F. Supp. at 1140-41. It may be possible in many instances for the judge to make an initial determination (based largely on common sense) as to those statements that are "purely secular" and allow those to go to the jury on the claim of fraud. But sorting out the "arguably religious" from the "purely secular" can never be reliably performed by a jury consistent with the rule in *Ballard*. Claims against new religious movements are simply too inflammatory and emotion-charged for a jury to make decisions that safeguard the liberties of unpopular religions. Thus, sending these questions to a jury, as the court in *Christofferson* directed (*Christofferson*, 644 P.2d at 599-605), is inviting error. The predictable happened when on remand the jury returned a \$39 million verdict for *Christofferson*. That verdict was later set aside by the trial judge for prejudicial statements during closing argument and erroneous jury instructions. *Leeson, Ore. Jury: Church Must Pay \$39 M for Fraud*, 7 NAT'L L.J. 8 (June 10, 1985), and "*\$39 M Verdict In Scientology Case Reversed*," 7 NAT'L L.J. (July 1985). The case is now facing a third trial.

Also problematic in *Christofferson* is that the appeals court treated the first amendment as an affirmative defense, thus placing the burden of producing evidence on the church concerning the religious character of each representation alleged by the plaintiff to be fraudulent. *Christofferson*, 644 P.2d at 605.

⁶⁷² *Van Schaick*, 535 F. Supp. at 1140.

⁶⁷³ *Molko*, 224 Cal. Rptr. at 828-29.

⁶⁷⁴ *Id.* at 827-30.

⁶⁷⁵ *Id.* at 829-30.

the brief passage of time since our parent's generation. Second, is the continued pluralization of religion. Religion in America has always been diverse: initially many Protestant sects, then both Protestant and Catholic, then Judeo-Christian. Now with the proliferation of new religious movements and Eastern sects, one wonders whether greater diversity is even possible. Third, following closely on the heels of secularization and pluralization, is privatization of faith. To many Americans, religion is best kept in the closet, to be spoken of in public, if at all, only in hushed tones, and always in tolerant and inclusive language so as not to offend. For the many who feel this way about religion, it is an uncivil act, even crude barbarism, when others—be they media-evangelists, politicians, or whatever—bring their religion into the public square in order to shape civic policy in ways consistent with their world view.

These three socioreligious developments bring particularly stressful conflicts into the civil courts. As emerging theories of tort law run headlong into claims of religious liberty, courts cannot avoid the need to adjudicate the disputes and thus make value choices. To be sure, the courts must make value choices. Although they feign objectivity, there is no neutral ground in the choice between either religious liberty or the recovery of damages for injury at the hands of religion. For "the law of torts," too, "is a battleground of social theory."⁶⁷⁶

In this face-off between liberty and theories of tortious recovery, churches are both advantaged and disadvantaged. They are advantaged because they have the first amendment, and it is frequently the trump card in this struggle. They are disadvantaged because the civil courts and the jurisprudential community in general are unschooled in ecclesiastical matters and thus often insensitive to claims of church purity and institutional integrity. In part, this is because law itself has been affected by secularization. And in part this is because American law has forgotten the past. This near-loss of history is both by its distortion and by its being disowned. Americans sometimes act as if our past is something to flee from rather than to feed from. "Our conception of present and past is no longer the dwarf standing on the giant's shoulders. In our art and literature and philosophy, the dwarf has gotten down from the giant, to stand on the ground and kick the giant's ankles."⁶⁷⁷ If this pattern continues, church teaching, counseling and disciplining may be a major battleground of church-state relations for the balance of this century. Accordingly, the sections in this article on the history of confession and discipline in the church are particularly important in assisting the courts in recapturing the past and sensitizing the juris to the unfamiliar matters of ecclesiology and theology.

Serious confrontations will not be avoided, indeed, they are already upon us. But when the judgments are handed down, it is hoped that they are made having fully taken into account the consequences for the church and its interests in freely pursuing its calling as it understands it.

⁶⁷⁶ W. POSSER & W. KEETON, *supra* note 477, § 3.

⁶⁷⁷ Nisbet, *The Most Unbelievable Thing*, CHRON. OF CULTURE 22, 23 (Mar. 1986).